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Recovering the Social Value of Jurisdictional Redundancy

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This Article presents the case for pluralism in litigation. Pluralism, in the form of jurisdictional redundancy, is embedded in our federalist system and our preference for adversarial adjudication. Judges and scholars should take more seriously the social benefits of multicentered litigation. These benefits include avoiding error, limiting the deleterious effects of private interests on the judicial system, and encouraging innovation. In furtherance of this goal, the Article proposes a three-factor test that judges and policy makers consider in determining the level of centralization appropriate in a given case: (1) the extent and nature of underlying substantive disagreement, (2) the costs of inconsistency, and (3) the role of political power in the litigation. The questions judges, legislators, and scholars should ask is not only how much pluralism our system of adjudication can tolerate, but also how much uniformity we should expect in a pluralist society.

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I. INTRODUCTION

There is a preoccupation with centralization in civil procedure.[1] The overlap of multiple state and federal lawsuits is largely lamented as a source of inefficiency and an opportunity for unprincipled manipulation. The articulated basis for diversity jurisdiction, fear of bias from local courts, is considered weak in a nation that has become more and more culturally and economically homogenous. National litigation thrives. The Class Action Fairness Act (CAFA) federalized what would have been state-court class actions in an attempt to centralize power over them.[2] Large-scale settlements of nationwide lawsuits against manufacturers continue to appear in the headlines.[3] The American Law Institute's (ALI) draft *Principles of the Law of Aggregate Litigation* favors more centralization mechanisms in aggregate litigation.[4] Scholars propose that courts jettison the *Erie* doctrine or the *Klaxon* rule and develop national law for suits arising out of conduct in national markets.[5]

The pluralist values advanced by jurisdictional redundancy have been largely compromised in the attempt to resolve the troubling problems posed by aggregate litigation. We have too quickly adopted the now-dominant view favoring centralization. It is time to refocus on the social value of the multiple centers of authority that jurisdictional redundancy permits. This Article presents the case for multicentered

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1. *See* Judith Resnik, *From "Cases" to "Litigation,"* 54 LAW & CONTEMP. PROBS. 5, 6 (1991).

2. Class Action Fairness Act of 2005 (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.).

3. *See, e.g.*, Alex Berenson, *Merck Is Said To Agree To Pay $4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9 2007, at A1.

4. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2006) (Discussion Draft).

5. *See, e.g.*, Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1840 (2006) (propounding a "goods on the national market" theory of choice of law). For a contrary view, see Linda S. Mullenix, *Gridlaw: The Enduring Legacy of* Phillips Petroleum Co. v. Shutts, 74 UMKC L. REV. 651, 654-55 (2006) (arguing that choice of law remains a substantial barrier to all class actions and aggregations).

litigation with particular focus on the potential uses of the Multidistrict Litigation (MDL) Act[6] to realize pluralist values.

This Article makes both descriptive and normative claims in favor of multicentered litigation. The description of the current litigation landscape reminds us that disputes continue to appear in multiple, parallel, and competing forums. This is not news. Multiple centers of authority are embedded in the structure of our federalism. Our dual court system may even be said to encourage overlapping centers of decision-making power. It is particularly important to remember this political fact as the emphasis on centralization becomes more entrenched in procedural doctrine and jurisdictional mandates. Furthermore, coordination rules within our federalist system have the potential to tilt in different directions: in favor of centralization or against it and in favor of the state or federal judicial systems. For example, the MDL Act favors centralization of federal cases, at least in the pretrial phase.[7] CAFA federalized class actions and permitted MDL transfer of cases removed to federal courts when these cases are certified or sought to be certified as class actions under Rule 23.[8] The Full Faith and Credit Act,[9] on the other hand, favors state judgments, and the *Erie*[10] doctrine and *Klaxon*[11] rule favor state laws.

The normative claim advanced here is that multiple centers of adjudication offer benefits that proceduralists should take more seriously. This Article reconsiders Robert Cover's thesis on the uses of jurisdictional redundancy in light of nearly thirty years of significant developments in procedure and jurisdiction.[12] In the process, it calls into question some of the assumptions embedded in the current focus

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6. 28 U.S.C. § 1407 (2000).

7. *Id.*; *see* Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883, 897 (2001) (presenting empirical data showing that approximately two-thirds of motions for transfer under the MDL statute are granted and that "during the 1990s, the panel granted almost three-quarters of the motions for transfer in mass product defect cases that came before it, although in the previous decade it has only granted about one-third of these motions").

8. 28 U.S.C. § 1332(d)(11)(C)(i) (Supp. V 2005) provides that mass actions removed under § 1332(d)(11) shall not be transferred pursuant to § 1407. If the cases are certified under Rule 23 or the plaintiffs request certification, the bar on multidistrict transfer will not apply. *Id.* § 1332(d)(11)(C)(ii).

9. Full Faith & Credit Act, 28 U.S.C. § 1738 (2000).

10. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-79 (1938) (holding that state law governs cases heard under the federal courts' diversity jurisdiction).

11. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1942) (holding that a federal court must apply the conflict-of-laws rules of the state in which it sits).

12. *See* Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 642-43 (1981).

on centralization. I do not suggest that we ought to resign ourselves to needless and wasteful repetition. The claim here is that jurisdictional redundancy is not merely repetitive. In formulating measures for reform of our judicial systems we should consider the ability of multiple centers of adjudication to encourage socially beneficial institutional conflict and plural conceptions of the good.

To understand the concept of multicentered litigation, it is helpful to distinguish it from two other concepts: atomization and polycentric disputes. Atomization is the central quality of a system that requires complete individuation of lawsuits. It is an ideal based on the individual right to be heard and participate in a process that leads to the resolution of a lawsuit. This ideal remains strong in theory if not in practice.[13] The most familiar antithesis of atomized litigation is the class action. Atomized litigation can exist within a decentralized system, a multicentered system, or a centralized one as long as cases are not resolved on an aggregate basis.[14] Likewise, a multicentered approach to litigation does not require that each suit be tried individually; neither does it require collective litigation.[15]

The second useful distinction is between polycentric disputes, a term used by Lon Fuller to describe disputes he thought were not amenable to adjudication, and multicentered litigation, which involves overlapping institutions.[16] This jurisdictional argument does not require a conclusion regarding the viability of the category of polycentric disputes or a position on Fuller's rejection of the possibility of adjudicating them. Many of the cases that courts and commentators seek to centralize, such as tort cases, fall squarely within the category

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13. *See* Martin v. Wilks, 490 U.S. 755, 762 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1074, *as recognized in* Landgraf v. USI Film Prods., 511 U.S. 244 (1994) (referring to "our deep-rooted historic tradition that everyone should have his own day in court" (internal quotation marks omitted)); Robert G. Bone, *Rethinking the "Day in Court Ideal" and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 203-12 (1992) (providing a historical account of the "Day in Court" ideal).

14. Of course, centralization through mechanisms such as the MDL can create a momentum towards group treatment of similar suits.

15. This is analogous to the distinction between personal jurisdiction and subject matter jurisdiction. Personal jurisdiction relates only to the court's power over the individual. Like subject matter jurisdiction, the issue addressed here concerns the power of the courts in relation to one another.

16. *See* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-96 (1978). Fuller described a polycentric dispute as one in which each solution will have "a different set of repercussions and might require in each instance a redefinition of the 'parties affected.'" *Id.* at 395. He argued that adjudication was ill-suited to resolving disputes where polycentric elements predominated and that these disputes should be resolved by managerial direction or contract. *Id.* at 398.

of cases that Fuller would have considered appropriate for adjudication. The size and scope of the litigation, however, is so large that it presents institutional problems. The most popular solution to these problems is centralization.

This Article begins by showing that jurisdictional redundancy is a function of two fundamental features of our legal system: federalism and adversarial adjudication. To understand how these key features of our system work, the second Part introduces three important concepts: strategic choice, horizontal redundancy, and vertical redundancy.[17] This definitional section establishes two central points. First, jurisdictional redundancy enables pluralism by operating both horizontally (across court systems) and vertically (within court systems over time). Second, the strategic manipulation of procedural rules is an inherent and permanent feature of our system. The mere use of stratagems in and of itself should not be considered an evil, although it may be frustrating at times. Instead, rule makers are (and ought to be) strategists who try to predict and direct litigant behavior.

The third Part of this Article describes recent developments and proposals for centralizing reforms. It presents the arguments in favor of centralization and then focuses on recent proposals to further centralize litigation and to coordinate redundancies between court systems. This Part shows that the mantra of reformers over the last forty years has been centralize, centralize, centralize. This consistent theme has given short shrift to the pluralist values embedded in our federalist system.

The fourth Part of this Article presents the benefits of multi-centered litigation. Multicentered litigation has a role in avoiding error, limiting the deleterious effects of private interest on the system, permitting innovation, and addressing the effects of decision-maker ideology. Repetition of litigation, inevitable under a redundant system, will not prevent errors. But jurisdictional redundancy will decrease the effects of errors made by any particular court. Moreover, redundancy permits a more accurate reflection of fundamental disagreements in political and social life, something that the concept of "error" (implying the existence of a correct outcome) cannot quite capture.

This insight reminds us that the courts are a political branch. The same issues that arise in any political system are present there, too. For this reason, it is important to consider the role of private interests in

17. Cover called horizontal redundancy "synchronic" and vertical redundancy "sequential." *See* Cover, *supra* note 12, at 646. These terms are explained in greater detail *infra* Part II.B-C.

litigation, the effect of innovation in different courts on the overall litigation and social landscape, and the role of ideology in legal decision making. Interest, innovation, and ideology are sources of what might be described as error, but they are also necessary and useful characteristics of a liberal pluralist society such as ours.

Given that deep social disagreements persist, the fifth Part of the Article asks how much pluralism our system can tolerate and then turns the question around, considering how much uniformity we should expect in a pluralist society. These are fundamental questions of political philosophy and social life. As John Rawls posed the question: "How is it possible that there may exist over time a stable and just society of free and equal citizens profoundly divided by reasonable though incompatible religious, philosophical, and moral doctrines?"[18] Political philosophers continue to search for an answer to this question.

This Article offers a defense of pluralist values in adjudication and reminds the reader what is lost in centralizing reforms. In furtherance of this goal, I propose three factors that judges and policy makers consider in determining the level of centralization appropriate in a given case: (1) the extent and nature of underlying substantive disagreement, (2) the costs of inconsistency, and (3) the role of political power in the litigation. The fifth Part illustrates how pluralist values can be taken into account in jurisdictional decisions by applying these factors to two case studies: a hypothetical pharmaceutical litigation and *In re National Security Agency Telecommunications Records Litigation*.[19] These examples demonstrate the costs and benefits of both the multicentered and centralizing approaches and show how important it is for courts to take social context into account in evaluating what solution is best for a particular litigation.

II. WHAT IS MULTICENTERED LITIGATION?

The concept of multicentered litigation has its roots in legal pluralism. Legal pluralism is "a situation in which two or more legal systems coexist in the same social field."[20] This concept can include

18. JOHN RAWLS, POLITICAL LIBERALISM, at xviii (1993).

19. 444 F. Supp. 2d 1332 (J.P.M.L. 2006).

20. Sally Engle Merry, *Legal Pluralism*, 22 LAW & SOC'Y REV. 869, 870 (1988). For thoughtful discussions of pluralism, see DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM (2007); CAROL WEISBROD, EMBLEMS OF PLURALISM: CULTURAL DIFFERENCES AND THE STATE (2002); Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. 1155, 1179-96 (2007); Robert M. Cover, *The Supreme Court, 1982 Term—Foreword:* Nomos *and Narrative*, 97 HARV. L. REV.

both formal and informal legal systems, but the focus here is on one form of juristic legal pluralism as it appears in official, state-sanctioned forums. Multicentered litigation describes overlapping legal institutions consisting of multiple state and federal aggregated and consolidated cases, functioning in tandem with legislative institutions on the state and federal level.

In the scholarly literature on civil procedure, the idea of legal pluralism first gained traction in an influential article by Robert Cover entitled *The Uses of Jurisdictional Redundancy*.[21] Cover used the term *complex concurrency* to refer to our system of courts with overlapping jurisdiction.[22] The existence of overlapping jurisdiction allows for the creation of multiple, overlapping centers of legal decision making. Cover suggested three characteristics of a system of complex concurrency: strategic choice, horizontal (or synchronic) redundancy, and vertical (or sequential) redundancy.[23]

Strategic choice and jurisdictional redundancy are features of our system that have come under attack by centralizing reformers. This is in part because they often result in frustration to litigants and judges. That perception ought to be reframed in light of the fact that these characteristics are the unavoidable result of the twin features of our legal system: federalism and adversarial adjudication. Later, we shall see that there is some good to be found in the structure of our legal system, despite the fact that it gives rise to these complaints. This Part begins the reframing process by defining the terms for discussion.

4, 11-13 (1983) (detailing Cover's concept of a normative universe); Martha Minow, Keynote, *Before and After* Pierce*: A Colloquium on Parents, Children, Religion and Schools*, 78 U. DET. MERCY L. REV. 407, 409-11 (2001) (describing pluralism as the basis for analyzing *Pierce v. Society of Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925)); Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296, 296-300 (2000) (providing a broad overview of legal pluralism). This is by no means an exhaustive list of the influential work in this field. Inquiries into the benefits of dual systems along similar lines include Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006), and Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005).

21. Cover, *supra* note 12. Many of these ideas have been further developed by Judith Resnik. *See, e.g.*, Judith Resnik, *Normative Lessons on American Federalism from the Class Action Rule of 1966 to the Class Action Fairness Act of 2005: The Political Safeguards of Translocalism and Transnationalism*, 156 PENN. L. REV. (forthcoming 2008) (describing and critiquing the centralization of jurisdiction in the federal courts).

22. Cover, *supra* note 12, at 642.

23. *Id.* at 646.

A. Strategic Choice

Strategic choice is the tactical deployment of procedure to manipulate the substantive outcome of a given action. Although it is ordinarily characterized as abusive, the tactical deployment of procedure is better understood as inherent in any procedural regime seeking to regulate adversarial litigation. It represents the expression of litigant autonomy, something that is usually considered a social good rather than a social ill.[24] The job of the rule drafters and enforcers is to consider the possibilities for manipulating procedures in rule structure and enforcement to avoid injustice. In a sense, rule makers and judges are, or at least ought to be, game theorists. Rather than jumping to a value judgment of any particular strategic manipulation of procedure, we need to unpack the meaning of that strategy for the goals of the system and the larger cultural and ideological context. The problem is that the goals of the system are many. Therefore, anyone's judgment about a particular strategic manipulation will be based on an underlying set of assumptions about the purpose of the judicial system.

Litigant use of procedure to obtain perceived tactical advantage is most familiar in the much-maligned practice of "forum shopping." Strategic choice of forum is utilized both by plaintiffs and defendants.[25] Plaintiffs choose to file their complaint in the forum they think will be most hospitable. Defendants may remove to federal court, a power greatly expanded by CAFA, which grants the federal courts jurisdiction over damages class actions valued at over $5 million.[26] Either party may move to transfer multiple cases filed all over the country to a single court. Defendants may wish to centralize cases in order to drive these lawsuits to global settlement or to save the cost of defending cases in multiple forums. Depending on the circumstances, defendants may instead fight that consolidation because they are concerned that the fact of consolidation itself will increase the number of suits filed against them. Both sides may try to refile a settlement-

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24. Thanks to Martha Minow for this insight.

25. Manipulation by plaintiffs, particularly plaintiffs' attempts to choose certain friendly courts, has garnered much of the focus of those concerned about forum shopping. It played a significant role in spurring the passage of CAFA, one of the most significant expansions of federal jurisdiction since the passage of the Multidistrict Litigation Act. *See* S. REP. NO. 109-14, at 4 ("To make matters worse, current law enables lawyers to 'game' the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.").

26. *See* 28 U.S.C. § 1332(d)(2) (Supp. V 2005).

only class action that had previously been rejected in a new court that they hope will approve that settlement, or seek an antisuit injunction barring such refiling.[27]

Strategic deployment of procedure is not limited to litigants. Judges can tactically manipulate the timing of decisions or provide "hints" to the litigants of how they plan to decide a motion in order to spur settlement. For example, in the Agent Orange litigation, Judge Weinstein issued a provisional ruling on choice of law that would have had substantial effects on the outcome of the litigation. The fact that the ruling was provisional momentarily insulated his ruling from appellate review while the parties considered the consequences.[28]

One benefit of strategic choice is that it can result in innovations that harness repetition. The recent decision by the Honorable Judge Alvin K. Hellerstein, United States District Judge for the Southern District of New York, to hold informal bellwether trials is an example of such innovation. All litigation arising out of the tragedy of September 11th, 2001 was consolidated before Judge Hellerstein.[29] Six years after filing suit, the plaintiffs were frustrated at the pace of the litigation. The judge believed that many of the cases would settle if the parties could agree on a mutually acceptable value.[30] He ordered that prior to determining liability, the court would hold damages trials of selected plaintiffs who would volunteer to participate. The results of these trials were to be available to other litigants in order to assist them in valuing cases for settlement.[31] A little over two months after Judge

27. The court may have the power to issue such an injunction under the All Writs Act, 28 U.S.C. § 1651 (2000).

28. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 128-31 (1986); *see also* Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2031 (1997) (discussing the problems of unreviewable discretion created by provisional rulings and the tension between the desirability of judicial innovation and the need for "fresh eyes" to review decisions).

29. *See In re* September 11th Litig., 494 F. Supp. 2d 232, 236 (S.D.N.Y. 2007). For an analysis of this phenomenon, see Robin J. Effron, *Event Jurisdiction and Protective Coordination: Lessons from the September 11th Litigation*, 81 S. CAL. L. REV. 199 (2008).

30. *In re* September 11th Litig., No. 21 MC 97 (AKH) (S.D.N.Y. July 5, 2007) (opinion supporting order to sever issues of damages and liability in selected cases at 3). *But see* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC. REV. (forthcoming 2008) (finding in a qualitative study that for many 9/11 victims litigation represents important nonmonetary civic values).

31. *In re September 11th Litig.*, No. 21 MC 97 (AKH) (opinion supporting order to sever issues of damages and liability in selected cases at 3).

Hellerstein ordered the damages trials, fourteen of the cases settled.[32] It seems likely that in the absence of the bellwether procedure these cases would not have settled so quickly. One reason for the speedy settlements may have been the judge's decision in one of the bellwether cases to grant the defendant's motion in limine and bar certain evidence of the plaintiff's earning potential and various other aspects of the events that occurred on September 11th, including events that occurred on the flight that the plaintiff was traveling on, from being introduced at trial.[33]

The decision to push certain cases to trial for the purpose of settling others in a mass tort case is a strategic deployment of procedure, but the fact that we call it strategic does not necessarily violate the principle of reaching a just, speedy, and efficient resolution of every action.[34] Instead, strategic choice raises fundamental questions about what strategies advance the social values the procedural system seeks to maximize. The problem is that our procedural system seeks to maximize multiple and not entirely compatible social values, among them rectitude, norm articulation, information forcing, accountability, and dispute resolution.[35] We lack a good theory of procedural justice to sort through these values. For instance, if the social value that the system seeks to maximize is rectitude—the correct application of law to the facts—one might prefer the deployment of procedure to determine liability before damages. Similarly, if the social value is norm articulation, Judge Hellerstein's approach of encouraging settlement may be criticized for failing to provide a trial on liability issues.[36] If the social value that the

32. *See In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Sept. 17, 2007) (order closing fourteen cases due to settlement).

33. *See In re* September 11 Litig., No. 21 MC 97 (AKH) (S.D.N.Y. Oct. 16, 2007) (order regarding defendant's motion in limine). I do not evaluate the merits of this decision. I only intend to point out that the judge created the moment for that decision through bellwether trials and reverse bifurcation. This then spurred settlement that might have otherwise been long-delayed.

34. *See* FED. R. CIV. P. 1 (commanding that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action").

35. *See* Sally Engle Merry & Susan S. Silby, *What Do Plaintiffs Want? Reexamining the Concept of Dispute*, 9 JUST. SYS. J. 151, 153-54 (1984) (commenting that decisions about litigation are driven by norms of citizenship and community).

36. For the argument that settlement erodes the norm articulation function of the courts, see Edward Brunet, *Questioning the Quality of Alternate Dispute Resolution*, 62 TUL. L. REV. 1, 9 (1987) (questioning "whether the rush to compromise, a characteristic of numerous ADR methods, will advance the important policies underlying substantive law"); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984) (arguing that settlement is not preferable to judgment and moreover settlement should not be institutionalized); David Luban, *Settlement and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2648 (1995)

system seeks to maximize is efficient closure of open cases (what might be called "pure dispute resolution"), then Judge Hellerstein's approach was exactly right.

B. Synchronic Redundancy

Synchronic redundancy is the horizontal overlap of multiple forums deciding the same questions at or around the same time. Synchronic redundancy occurs when individual cases presenting similar factual and legal questions are filed in multiple federal district and state courts. Coordination rules can be employed to limit synchronic redundancy. The MDL Act was codified in an attempt to limit synchronic redundancy in federal courts with respect to discovery and other pretrial proceedings by transferring cases presenting common questions to one court.[37] The antisuit injunction, another coordination rule, has recently engaged scholars in the context of class actions.[38] Settling parties can seek an antisuit injunction preventing class members from bringing suits in any other forum.[39] Or they may seek a determination that a rival action is barred in the forum where a competing suit was filed.[40]

Yet coordination rules cannot eradicate synchronic redundancy. Despite the courts' ability to transfer cases sharing common issues of fact or law to a single forum, synchronic redundancy persists. Federal and state courts maintain concurrent jurisdiction over many types of cases. The *Vioxx* litigation is illustrative. Vioxx was a prescription pain relief drug approved by the Food and Drug Administration in May 1999. In September 2004, the drug's manufacturer, Merck, voluntarily removed it from the market when a study indicated that the use of the drug increased the risk of some types of heart attacks and strokes.[41]

(stating that "[t]he opacity of settlements is particularly troubling"); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning Of Article III*, 113 HARV. L. REV. 924, 1000-02 (2000) (discussing a normative theorist's concerns about privatization of judging).

37. *See* 28 U.S.C. § 1407 (2000).

38. *See* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1148-50 (1998) (arguing in favor of an expansive ability for unnamed plaintiffs to challenge class actions in other forums); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 PENN. L. REV. (forthcoming 2008) (arguing in favor of a limited reading of the Anti-Injunction Act based on the passage of CAFA).

39. *See* Monaghan, *supra* note 38, at 1150, 1151-52 n.13 (discussing *Baker v. General Motors Corp.*, 522 U.S. 222, 235-36 (1998), which distinguished between enforcement and preclusive effects of antisuit injunctions).

40. *See* Syngenta Crop Prot. Inc. v. Henson, 537 U.S. 28, 34 (2002).

41. *In re* Vioxx Prods. Liab. Litig., 239 F.R.D. 450, 452 (E.D. La. 2006).

Thousands of cases were filed against Merck and, as in many mass tort cases, they were consolidated in various forums. Over 7000 cases were removed to or filed in federal court and aggregated in the United States District Court for the Eastern District of Louisiana by the Judicial Panel on Multidistrict Litigation (JPML).[42] Large numbers of cases were also filed in New Jersey, California, and Texas.[43] The number of cases filed in New Jersey and consolidated there was recently approximated at 15,000 suits.[44] Mass torts are ordinarily characterized by this type of procedural history: thousands of lawsuits filed in state courts, some removed to federal court and transferred to a single court under the MDL statute, then consolidated before a single judge, while other cases remain in state courts and are consolidated and centralized there.

C. Sequential Redundancy

Sequential or diachronic redundancy is the vertical overlap of decision making or the ability of courts to revisit the decisions of previous courts. We see sequential redundancy in appeals, the writ of habeas corpus, and collateral attacks on judgments.[45] Sequential redundancy surfaces in multidistrict litigation, such as when a case is returned for trial to the transferor court.[46] It appears in the right to interlocutory appeals in class action certification decisions,[47] and in collateral attacks on class action settlements. Collateral attacks have surfaced as the most significant and controversial form of sequential

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42. *See In re* Vioxx Prods. Liab. Litig., 360 F. Supp. 2d 1352, 1353-54 (J.P.M.L. 2005).

43. *See, e.g.*, Ledbetter v. Merck & Co., No. 2005-59499 (Tex. Dist. Apr. 20, 2007) (order granting defendant's motion for partial summary judgment and granting expedited appeal) (granting partial summary judgment for defendant on grounds that plaintiffs' fraud on the FDA claims are preempted by federal law).

44. *See In re* Vioxx Litig., 928 A.2d 935, 937 (N.J. Super. Ct. App. Div. 2007); N.J. Judiciary, New Jersey Supreme Court Order (May 20, 2003), *available at* http://www.judiciary.state.nj.us/notices/n030611a.htm (designating all pending and future litigation statewide involving the drug Vioxx as a mass tort and transferring the management of all such cases to Atlantic County to be handled on a coordinated basis).

45. For an insightful comparison of habeas and collateral attacks in the class action context, see William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. REV. 790, 850-54 (2007).

46. *See* Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26, 41-43 (1998).

47. *See* FED. R. CIV. P. 23(f) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within 10 days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.").

redundancy with respect to class actions. The right to collaterally attack a class action settlement on the basis of inadequate representation is uncontested in principle, but there is no agreement on its parameters.[48] Some scholars argue that the right to collateral attack ought to be limited and others have argued for its expansion.[49]

Several doctrines prevent courts from revisiting previous decisions of the same facts or law. First, a decision by the JPML to transfer cases for pretrial litigation cannot be appealed except by extraordinary writ.[50] The reexamination clause in the Seventh Amendment limits reexamination of an issue of fact determined by a jury.[51] The doctrine of res judicata limits litigants' ability to relitigate a claim that was or could have been raised in a prior action.[52] The doctrine of collateral estoppel prohibits relitigation of the same issue and can be used offensively by a party that did not litigate the issue in the first action.[53] Preclusion is a particularly powerful tool in the class action context, where settlement of a class action in one forum will extinguish all claims, even those that could not have been brought in the settling forum.[54]

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48. Dow Chem. Co. v. Stephenson, 539 U.S. 111, 112 (2003) (per curiam). An evenly divided court affirmed the judgment below on the question of whether collateral attack was permitted by claimant who discovered injury after close of settlement. *Id.*

49. For arguments in favor of limiting the right to collateral attack, see Samuel Issacharoff & Richard Nagareda, *Class Action Settlements Under Attack*, 156 PENN L. REV. (forthcoming 2008); Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. M.C.A., Inc., 73 N.Y.U. L. REV. 765, 782 (1998) (arguing against a broad right to collaterally attack class action settlements on the basis of inadequate representation and proposing a narrower basis for collateral attack). For an argument favoring an expansive right to collateral attack, see Monaghan, *supra* note 38, at 1152-53 (arguing in favor of a broad right for absent class members to challenge preclusive class judgments in their chosen forum).

50. 28 U.S.C. § 1407(e) (2000) (limiting review of orders).

51. U.S. CONST. amend. VII. *Compare In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (holding that the reexamination clause limits a court's ability to bifurcate cases in mass torts), *with* Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 IOWA L. REV. 499, 501-02 (1998) (reaching the opposite conclusion).

52. *See* Rivet v. Regions Bank of La., 522 U.S. 470, 474 (1998); 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4406, at 138-44 (2d ed. 2002).

53. *See* 18 WRIGHT, MILLER & COOPER, *supra* note 52, § 4416, at 386-412.

54. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (holding that the Full Faith and Credit Act requires federal courts to give preclusive effect to state judgments even when the state court judgment at issue incorporates a class action settlement releasing claims solely within the jurisdiction of federal courts, as long as they comply with due process). Subsequently, on remand the Ninth Circuit held that the Supreme Court's decision determined that the state court judgment comported with due process. *See* Epstein v. MCA, Inc., 179 F.3d 641, 649-50 (9th Cir. 1999); *see also In re* Prudential Ins. Co. of Am.

III. CENTRALIZATION IN CONTEXT

Complex concurrency is a source of frustration for judges, legislators, and civil procedure scholars because it creates inefficiencies, is difficult to coordinate, and makes global settlement of mass cases challenging. The widespread reaction to complex concurrency since the late 1950s has been centralization. The factors driving centralization are familiar. Repetitive litigation of the same questions is costly and courts have scarce resources. It is efficient to centralize cases in order to gain economies of scale in decision making, avoid costly repetition of discovery, and perhaps spur private settlement to resolve cases without further expenditure of court resources. This Part presents the arguments in favor of centralization, describes the historical developments that led to what Richard Marcus calls a "maximalist" use of centralizing procedures,[55] and presents some recent proposals to centralize litigation even further.

A. Why Centralize?

There are four reasons why scholars and policy makers favor centralization in litigation: it reduces transaction costs, produces uniformity, avoids inconsistent judgments, and reduces litigant abuse. First, centralization saves transaction costs. Many cases, such as those transferred and consolidated to a single court under the auspices of the JPML, involve similar factual and legal issues. Having multiple judges in different districts or court systems manage overlapping discovery, for example, can result in multiple depositions of key witnesses and repetitive pretrial motions. Although duplicative discovery is less of an issue with the advent of electronic record keeping, multiple depositions and redundant motions impose significant costs on the court system, litigants, and witnesses.

Second, a centralized system produces uniform results, reducing the costs of coordination. By contrast, competing systems generate confusion about what the law is and uncertainty about outcomes of

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Sales Practice Litig., 261 F.3d 355, 366 (3d Cir. 2001) ("It is now settled that a judgment pursuant to a class settlement can bar later claims based on the allegations underlying the claims in the settled class action. This is true even though the precluded claim was not presented, and could not have been presented, in the class action itself."). Some state courts have been very receptive to collateral attacks for citizens of their states in nationwide class actions. *See* State v. Homeside Lending, Inc., 2003 VT 17, ¶ 68, 175 Vt. 239, 268, 826 A.2d 997, 1020 (2003).

55. Richard L. Marcus, *Cure-All for an Era of Dispersed Litigation? Toward a Maximalist Use of the Multidistrict Litigation Panel's Transfer Power*, 82 TUL. L. REV. 2245, 2258 (2008).

particular cases. Coordination and uniformity will not necessarily lead to predictability in a legal system. Nevertheless, uniformity can combat the threat posed by multiple legal decision makers (courts and legislatures on the state and federal level) making decisions affecting the national economy.[56]

Third, centralization avoids the risk of inconsistent judgments. If multiple forums are hearing the same type of case, then some cases may come out differently. This heterogeneity may be unacceptable with respect to some questions, such as privileges, where inconsistency can result in directly contradictory court orders with respect to identical subject matter.[57] This problem is more severe where there is a single court that is an outlier with respect to an issue on which all other courts agree. This phenomenon can in turn encourage forum shopping and other strategic manipulations of the system to move cases to the outlier court, perhaps giving it more power than it deserves. Centralization and coordination solve this problem by eliminating or controlling the outlier (unless, of course, the litigation is concentrated in the outlier court).

Fourth, centralization alleviates concerns about litigants abusing the system through strategic choices. Many have noted the potential for abuse of synchronic redundancies. For example, in the class action context, sometimes plaintiffs' class counsel have been accused of employing a "reverse auction."[58] These lawyers may take advantage of absent class members by seeking certification of a settlement that was disapproved of by a federal court in a more friendly state court. The concern is that class counsel will agree to suboptimal global settlements because they are risk averse.[59] Defendants have an interest in buying off the class counsel with the promise of guaranteed payment in order to reduce their overall exposure and obtain global peace. Synchronic redundancy allows risk averse litigants to seek out the forum that will accept such settlements. There are some

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56. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1356 (2006).

57. I discuss this issue *infra* Part V.B.

58. *See* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1370 (1995) (describing the reverse auction phenomenon as "a jurisdictional competition among different teams of plaintiffs' attorneys in different actions that involve the same underlying allegations").

59. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 390-93 (2000) (discussing risk aversion of class counsel).

documented examples of this happening.[60] It is notable that this criticism is never levied at federal courts certifying class actions.

A related concern is the filing of class action lawsuits, for settlement or litigation, in jurisdictions that will rubber stamp class certification.[61] Some fear that by obtaining certification in a forum hospitable to class actions, plaintiffs can exercise inordinate power over defendants to settle regardless of the merits of the underlying claim.[62] On examination, both of these problems appear to be exaggerated.[63] Perhaps in response to these concerns, CAFA provides that class actions removed to federal court may be subsequently transferred to another district permitting defendants substantial leeway to manipulate forum selection.[64]

Fears of abuse through strategic manipulation of multiple forums are animated by several principles. Those concerned about individual due process and process-based participation rights worry that individual class members are not getting their due. Others, concerned with the ability of the judiciary to adequately enforce legal standards and monitor lawyers in the aggregation context, express anxiety that plaintiffs' lawyers will enrich themselves at the expense of the class or innocent defendants. Still others are concerned that the judicial system is not institutionally competent to enforce laws governing conduct that causes mass harms. They believe this is a type of ex post liability that

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60. For example, the United States Court of Appeals for the Third Circuit overturned a notorious settlement in *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768, 778-79 (3d Cir. 1995). Undeterred, the parties refiled the settlement in Louisiana state court, where essentially the same settlement was approved. *See* White v. Gen. Motors Corp., 97-1028, p. 3 (La. App. 1 Cir. 6/29/98); 718 So. 2d 480, 481.

61. These are sometimes referred to as "judicial hell holes." Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates, and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. (forthcoming 2008).

62. *See In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299-1300 (7th Cir. 1995); HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973).

63. *See* Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429-30 (2003) (refuting "blackmail" thesis). Thornburg, *supra* note 61 (demonstrating that the American Tort Reform Association study misuses statistics and is misleading in other respects); Adam Liptak, *The Worst Courts for Businesses? It's a Matter of Opinion*, N.Y. TIMES, Dec. 24, 2007, at A10 (describing and critiquing an American Tort Reform Association publication purporting to rank these courts); *see also* PUB. CITIZEN, CLASS ACTION "JUDICIAL HELLHOLES": EMPIRICAL EVIDENCE IS LACKING 3 (2005), http://www.citizen.org/documents/OutlierReport.pdf (critiquing claims of the existence of districts particularly unfriendly to defendants or corporations, and finding that even the jurisdiction that showed evidence of unsubstantiated class certification had reduced its certification rate by 30% between 2003 and 2004).

64. 28 U.S.C. § 1332(d)(11)(C)(i) (Supp. V 2005).

would be more optimally administered through ex ante regulation.[65] These worries are sometimes expressed in lamentations about the deleterious effects of suits on the ability of businesses to thrive.

B. Historical Trends

As Richard Marcus and Judith Resnik have ably demonstrated, the minimalist policy in favor of using tools such as MDL transfer for coordination and consolidation of limited types of cases for limited purposes has been transformed into a maximalist regime of centralization.[66] Over time, concern seems to have shifted to solving the problems posed by complex concurrency through global peace. The animating assumption of scholars, policy makers, and jurists has been towards aggregation, not the individual's day in court.[67] This shift occurred for a variety of reasons. Like any large-scale historical development, it is impossible to point to a single cause. Some leading candidates include: the perception of an increase in lawsuits, a growing population, increasing economic activity, the passage of significant civil rights legislation, and the resulting sense that there was a burden on the administration of the courts that must somehow be addressed.[68]

The growth of economic activity of national scope created what historian Lizabeth Cohen has called the "Consumers' Republic."[69] Advocates for consumer rights pushed for national legislation governing standards for everything from car safety to mortgages, and in the process created individual rights so that some of those standards

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65. The American system that largely eschews ex ante regulatory regimes for ex post liability as a means for deterrence has been the subject of significant scholarly literature in political science and economics. *See, e.g.*, ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW 4 (2001) (contrasting the American preference for litigated rather than legislated alternatives with the European model of greater ex ante regulation); Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359-63 (1984) (presenting an economic analysis of ex post liability regimes); *see also* Samuel Issacharoff, *Regulating After the Fact*, 56 DEPAUL L. REV. 375, 378 (2007) (expressing "concern about the general tenor of tort reform and other initiatives whose effect, when examined en masse, is to circumscribe the availability of ex post accountability as a necessary complement to the liberalized ex ante economic environment in the United States").

66. *See* Marcus, *supra* note 55, at 2258-74; Resnik, *supra* note 1, at 42-43.

67. *See* Resnik, *supra* note 1, at 42-43.

68. *But see* Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285, 304 n.104 (2002) (describing and debunking the critique that litigation in America has increased substantially). Galanter points out that lawsuit filings declined from 1990 to 2001. *Id.*

69. LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2003).

could be vindicated through lawsuits rather than solely through regulatory enforcement.[70] Consumer suits were the basis for the adoption of the controversial damages class action codified in Federal Rule of Civil Procedure 23(b)(3). As Justice Douglas explained in 1974, at what was arguably the high tide of the consumer movement:

> I think in our society that is growing in complexity there are bound to be innumerable people in common disasters, calamities, or ventures who would go begging for justice without the class action but who could with all regard to due process be protected by it. Some of these are consumers whose claims may seem *de minimis* but who alone have no practical recourse for either remuneration or injunctive relief. Some may be environmentalists who have no photographic development plant about to be ruined because of air pollution by radiation but who suffer perceptibly by smoke, noxious gases, or radiation. Or the unnamed individual may be only a ratepayer being excessively charged by a utility, or a homeowner whose assessment is slowly rising beyond his ability to pay.
>
> The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.[71]

Justice Douglas's perception illustrates a theme discussed in the fourth Part of this Article: the role of interest and ideology in arguments about multicentered versus centralized litigation.

A few recent jurisdictional developments have further spurred the trend toward centralization. The biggest formal change has been the passage of CAFA, which expanded federal court jurisdiction to encompass essentially any class action.[72] Additionally, judges have deployed preclusion doctrine and antisuit injunctions to prevent litigation in competing forums.[73]

Informal developments have also spurred centralization. For instance, in cases that have been transferred under the MDL statute, transferee judges can arrange to sit by designation to try cases that have been transferred back to their home courts. Moreover, because both state and federal courts consolidate similar cases through

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70. *See id.* at 345-87 (describing the rise of the consumers' movement and political responses).

71. Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 185-86 (1974) (Douglas, J., dissenting in part) (footnote omitted).

72. *See* 28 U.S.C. § 1332(d)(2) (Supp. V 2005).

73. *See, e.g.*, *In re* Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 765-68 (7th Cir. 2003).

mechanisms like the federal MDL Act, judges can informally coordinate different aspects of these cases, including dispositive motions, discovery decisions, summary judgment, and other pretrial procedures with their counterparts in other courts. Such coordination can alter the course of the litigation and is one expression of the strategic deployment of procedure. For example, several judges overseeing aggregated cases concerning a particular type of product might decide between them to hold off on deciding summary judgment motions until the most opportune time to push the parties toward settlement. Such under-the-radar practices may raise due process concerns if litigants are denied the opportunity to present their case in such discussion between judges. They may also raise concerns about judicial independence if one judge tries to inappropriately influence the decisions of another. On the other hand, communication between judges avoids a gastonette, where each court waits for the other to decide.[74] Consultation allows judges to learn from one another and hopefully produce better decisions as a result.

Judges are not the only ones coordinating strategies. Attorneys in different jurisdictions, within and without the confines of cases aggregated through MDL or other state procedures, communicate with one another, sharing information, advice, and coordinating strategy.[75] This is not a new development,[76] but the growth of information technology has made national and international coordination easier. As a result of informal coordination, aggregate settlements have continued within and without the class action context. While some thought that the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*[77] might limit the ability of defendants to obtain global peace, it appears that aggregation techniques and strategic planning have made something like global peace possible even in the absence of class certification.[78]

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74. *In re* McLean Indus., Inc., 857 F.2d 88, 90 (2d Cir. 1988) (dismissing an appeal without prejudice and permitting a case to go forward in the Singapore court that was already considering the issues).

75. *See generally* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 896-97 (describing the networks between plaintiffs' attorneys in mass tort cases as a replacement to the formal centralization of the class action).

76. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1624 (2004).

77. 521 U.S. 591, 620 (1997).

78. The latest example is the Vioxx settlement. *See* Berenson, *supra* note 3.

C. Proposals To Increase Centralization

Proposals to further the maximalist approach to multidistrict litigation and other centralizing procedures continue to proliferate. Such proposals fall into two categories. One set of proposals attempts to limit synchronic redundancy. These proposals seek to consolidate in one forum cases that might otherwise have proceeded simultaneously in different forums. Antidotes to synchronic redundancy include revisiting the *Klaxon* rule, allowing MDL transferee courts to retain cases through trial, expanding lawyers' capacity to reach aggregate settlements, and broadening the availability of antisuit injunctions. Another category of proposals seeks to limit sequential redundancy, such as by limiting access to collateral attacks or narrowing the appellate standard of review.

The existence of multiple legal systems within the United States is the central cause of synchronic redundancy. Coordination between these systems is costly and this cost seems more wasteful in cases alleging harms caused by products sold nationally. Some scholars have argued that CAFA's expansion of federal court jurisdiction over nationwide consumer class actions traditionally governed by varied state laws requires the implementation of a national choice-of-law regime.[79] For example, one scholar has suggested that all "conduct that arises from mass produced goods entering the stream of commerce with no preset purchaser or destination should be treated as . . . goods in the national market" for choice-of-law purposes and governed by the law of the home state of the defendant.[80] Such a rule would limit synchronic redundancy by preventing multiple legal regimes from asserting the power to apply their own substantive law in a given case.

Proposals to limit synchronic redundancy have also been circulating with respect to multidistrict litigation. In *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the Supreme Court limited MDL transferee courts to adjudicating the pretrial phase of cases by reading § 1407 narrowly.[81] Congress has considered several bills to permit transferee courts to retain cases through trial, though none have passed into law.[82] The passage of such a bill would complete the

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79. *See* Issacharoff, *supra* note 5, at 1869.

80. *Id.* at 1842.

81. 523 U.S. 26, 40 (1998).

82. *See* Multidistrict Litigation Restoration Act of 2005, H.R. 1038, 109th Cong. (2005); Multidistrict Litigation Restoration Act of 2004, H.R. 1768, 108th Cong. (2004); Multidistrict, Multiparty, Multiforum Trial Jurisdiction Act of 2001, H.R. 860, 107th Cong. (2001).

centralization process begun by the MDL statute. The ALI Project on Aggregate Litigation has also proposed more formal treatment of settlement in aggregate litigation, a powerful tool for centrally resolving large-scale litigation.[83] Currently, the relevant ABA Model Rule of Professional Conduct, adopted in most jurisdictions, requires that lawyers representing multiple clients should not participate in aggregate settlements "unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims ... involved and of the participation of each person in the settlement."[84] The ALI reform proposal permits lawyers to obtain binding waivers from clients who agree in advance of negotiation to abide by any settlement approved by a supermajority of the other plaintiffs. The reforms concomitantly provide protections similar to those available in class settlements to aggregate settlements reached under the auspices of an MDL.[85] The ALI reform would permit lawyers to curtail the synchronic redundancy enabled by the rule requiring lawyers to consult clients on an individual basis when representing "inventory" cases. It would spur centralization of settlements by making it easier for lawyers to reach an aggregate agreement.

A final proposal for limiting synchronic redundancy is the expansion of antisuit injunctions. Courts have upheld the use of antisuit injunctions under the All Writs Act both where a class has been certified and where certification was denied.[86] For example, the United States Court of Appeals for the Seventh Circuit upheld an injunction barring a state court from considering certification of a class that had been denied certification by the federal courts.[87] This decision centralized the power to determine whether certification is appropriate in one court, but it also worked against centralization by barring class-wide litigation in *any* court.[88] Not surprisingly, a

83. AM. LAW INST., *supra* note 4.

84. MODEL RULES PROF'L CONDUCT R. 1.8(g) (2003).

85. AM. LAW INST., *supra* note 4. The proposal has met with some criticism. *See* Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 181-82 (1999).

86. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 20.32 (2004).

87. *See In re* Bridgestone/Firestone Tires Prods. Liab. Litig. (*Bridgestone/Firestone II*), 333 F.3d 763, 769 (7th Cir. 2003). This decision specifically carved out settlement-only class actions. *Id.* at 767.

88. *See* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1520 (2005).

settlement-only class action was subsequently approved in state court.[89] The United States Court of Appeals for the Third Circuit upheld an injunction barring parallel state proceedings after it had certified a national class action for settlement.[90] Where a class is denied certification based on inadequate representation, courts have held that they lack personal jurisdiction over the absent class members and therefore there can be no preclusive effect to the judgment.[91] To strengthen centralization, some scholars have argued that antisuit injunctions ought to be used earlier in the litigation, before a decision on certification has been rendered, where the federal court is concerned about negative effects of strategic choice.[92]

Attempting to reign in sequential (or vertical) redundancy, some scholars have advocated limiting the ability of litigants to bring collateral attacks on settlements in the class action context. The general principle is that class action settlements meeting due process requirements are binding on all absent class members regardless of the court in which the settlement was certified and approved.[93] Absent class members may collaterally attack a settlement on the basis of adequacy of representation. But the circuits are split as to what this means. Some courts think that a finding of adequacy in the first forum can be relitigated and reevaluated by a second forum.[94] Others have interpreted the due process requirement to be limited to an evaluation by the reviewing court of whether the procedures were in place in the first proceeding to ensure adequacy, without reevaluating the

89. *See* Shields v. Bridgestone/Firestone, Inc., Cause No. B-170,462, 2004 WL 546883, at *1 (Tex. Dist. Mar. 12, 2004); Brenda Sapino Jeffreys, *Judge Approves $149 Million Firestone Tire Settlement, But Not All Class Members Think It's a Good Deal*, LAW.COM, Mar. 22, 2004, http://www.law.com/jsp/article.jsp?id=1079640446435.

90. *In re* Diet Drugs, 282 F.3d 220, 232 (3d Cir. 2002).

91. *In re* Ford Motor Co., 471 F.3d 1233, 1243 (11th Cir. 2006).

92. *See* Wolff, *supra* note 38.

93. *See* Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 373 (1996) (holding that a federal court must give preclusive effect to a state court judgment settling federal claims under the Full Faith and Credit Act).

94. *See* Stephenson v. Dow Chem. Co., 273 F.3d 249, 257-61 (2d Cir. 2001) (permitting a plaintiff whose injuries manifested themselves after the expiration of a class-wide settlement to collaterally attack the settlement on grounds of adequacy of representation), *aff'd in part, vacated in part*, Dow Chem. Co. v. Stephenson, 539 U.S. 111 (2003); *see also* State v. Homeside Lending, Inc., 2003 VT 17, ¶¶ 23-59, 175 Vt. 239, 251-65, 826 A.2d 997, 1007-18 (2003) (permitting Vermont residents to bring suit because of inadequate representation in initial action, despite an Alabama judgment purporting to resolve all claims nationwide).

substantive finding.[95] This split has basically tracked the treatment in legal scholarship, with some added nuances not central to the discussion here.[96] The debate centers on the following question: How many opportunities should litigants have to revisit the same issues in a system with scarce resources?

The obvious benefits of centralization underlying these proposals are efficiency, certainty, and, in some cases, the prevention of abuse. Horizontal and vertical redundancies are often depicted as offering numerous opportunities for strategic manipulation. Rarely recognized, however, is the fact that every aspect of the procedural system, from filing through discovery, dispositive motions, and finally trial, is the subject of such stratagems whether cases are centralized or not. Moreover, centralization and the coordination it requires in a multilayered federalist system such as ours carries with it substantial difficulties and costs.

A closer look at any such strategic choice reveals the complexity of the system and the difficulty of curing perceived abuses through centralizing reforms. For example, forum shopping is often discussed as a reason for various centralizing reforms.[97] The whole picture is more complex and therefore not amenable to a simple coordinating solution. One example of this complexity is the phenomenon of

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95. Epstein v. MCA, Inc., 179 F.3d 641, 648 (9th Cir. 1999) (holding that collateral attack is never available provided that procedures were in place to ensure the adequacy of representation in initial proceeding).

96. Scholars who would limit the right to collateral attack include Issacharoff & Nagareda, *supra* note 49 (arguing in favor of a process-based approach to collateral attack), and Kahan & Silberman, *supra* note 49, at 774 (arguing for limitations on collateral attack based on adequacy of representation in light of right to opt out). Scholars favoring more expansive rights to litigate the adequacy of representation in a collateral proceeding include David A. Dana, *Adequacy of Representation After* Stephenson*: A Rawlsian/Behavioral Economics Approach to Class Action Settlements*, 55 EMORY L.J. 279, 282-85 (2006) (arguing in favor of broad review of settlement outcomes in collateral proceedings based on fairness criteria); Susan P. Koniak, *How Like a Winter? The Plight of Absent Class Members Denied Adequate Representation*, 79 NOTRE DAME L. REV. 1787, 1862 (2004) (arguing in favor of de novo review of adequacy by reviewing court); Monaghan, *supra* note 38, at 1162-78 (arguing in favor of right to litigate questions of adequacy in collateral forum); Patrick Woolley, *The Availability of Collateral Attack for Inadequate Representation in Class Suits*, 79 TEX. L. REV. 383, 389-97 (2000) (same). Still others have adopted a middle ground. *See* Rubenstein, *supra* note 45 (presenting a multifactored test); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 804 (2005) (arguing that the court reviewing the initial judgment should "constrain the judgment's effect upon the claims not litigated in that action to the extent necessary to cure the prejudice that the absentees would otherwise suffer from the inadequate representation of their interests").

97. *See* Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 384-91 (2006) (describing and critiquing representations of forum shopping as a form of "cheating" instead of a legitimate strategy).

"settlement shopping." When one court rejects a settlement as fundamentally unfair to absent class members, the parties may obtain class certification of the same settlement in a second court.[98] Settlement shopping is made possible by centralization and is also the subject of centralizing reforms.

The power of preclusion, combined with the availability of parallel forums, creates the possibility of global peace regardless of the previous court's assessment of the desirability of the particular arrangement at issue. In the *Bridgestone-Firestone Litigation*, the Seventh Circuit denied certification of a nationwide class and barred any other court from reconsidering class certification.[99] A rival class action was certified in state court as a settlement class action.[100] Even if certification was truly barred, the resulting nonclass individual cases may nevertheless be resolved as an aggregate settlement. Or, if the amount at stake is sufficiently small and certification is impossible, the plaintiffs may need to withdraw their individual suits. In sum, litigant ingenuity will almost always outpace the development of tools for controlling the strategic deployment of procedure.

IV. THE BENEFITS OF MULTICENTERED LITIGATION

The benefits of pluralism are rarely discussed in modern scholarly literature on complex litigation.[101] Some scholars have argued that centralization serves as an unwarranted limitation on states' rights, especially if some kind of national law were used rather than paying attention to each state's legal regime.[102] Others have expressed concerns about the consequences of aggregation and class treatment for individuals, particularly in light of the possibilities for plaintiffs' lawyers to trade off the interests of one group in favor of

98. *See* Koniak, *supra* note 96, at 1780 (discussing the possibility of abuse through settlement shopping); *see also In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 134 F.3d 133, 137 (3d Cir. 1998) (describing how after the Third Circuit rejected a settlement, "the parties to the settlement repaired to the 18th Judicial District for the Parish of Iberville, Louisiana, where a similar suit had been pending, restructured their deal, and submitted it to the Louisiana court, which ultimately approved it").

99. 333 F.3d 763, 769 (7th Cir. 2003); Jeffreys, *supra* note 89.

100. *See supra* note 89 and accompanying text.

101. Judith Resnik's work is an exception to this assertion. *See, e.g.*, Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1647-51 (2006) (approving of multiple avenues for the adoption of foreign law into the U.S. legal system, including federal, state, and local legal systems).

102. *See, e.g.*, Mullenix, *supra* note 5, at 654.

another.[103] But beyond these specific concerns, there is seldom discussion of the social value of the institutional conflict produced by complex concurrency. A multifaceted consideration of the values advanced by multicentered litigation is therefore in order.

This discussion of the benefits of multiplicity is largely based on the idea that institutional conflict serves some social values. Mass tort cases present one area for institutional conflict. Consider harms suffered by patients who took certain pharmaceutical drugs. The conflict concerns four different types of institutions: courts, legislatures, administrative agencies, and corporations, operating at three levels: state, federal, and international. The product is regulated by the Food and Drug Administration (FDA), and while some state legislatures have enacted preemption provisions, other states have robust failure to warn claims. Lawsuits are brought in both state and federal courts. What conduct the FDA fails to regulate ex ante, a court may regulate through the enforcement (and development) of applicable laws ex post. Conflicts surface when courts and administrative agencies regulate the same conduct. Some advocate using preemption doctrine to resolve this institutional conflict by placing power exclusively in the hands of the federal agency.[104] Within the purview of the courts, state and federal decisions may differ, creating circuit splits and contradictory rulings. Coordination between courts, consolidation of cases, and transfer of cases to a single district are all methods of resolving these conflicts between and within court systems.

Institutional conflict can encourage the development of new approaches to social problems. It can furthermore correct for systemic

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103. Many have written excellent work on this topic. *See, e.g.*, Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 521–23 (1994).

104. As of this writing, the Supreme Court has not resolved this question. *See* Wyeth v. Levine, 128 S. Ct. 1118 (2008) (presenting the question of whether the FDA's prescription drug labeling judgments preempt state law liability claims for failure to warn); Warner-Lambert Co. v. Kent, 128 S. Ct. 1168, 1168 (2008) (per curiam) (affirming the ruling of the Second Circuit, which held that the Federal Food, Drug, and Cosmetic Act does not preempt product liability claims under Michigan law against drug manufacturers that allegedly defrauded the FDA); *see also* Ledbetter v. Merck & Co., No. 2005-59499 (Tex. Dist. Apr. 20, 2007) (order granting defendant's motion for partial summary judgment and granting expedited appeal) (holding that plaintiff's fraud on the FDA claims are preempted); Catherine M. Sharkey, *Preemption by Preamble: Federal Agencies and the Federalization of Tort Law*, 56 DEPAUL L. REV. 227, 242-58 (2007) (describing the replacement of private enforcement by public enforcement through preemption and proposing ways to harness this development to improve transparency in regulation); Catherine T. Struve, *The FDA and the Tort System: Postmarketing Surveillance, Compensation, and the Role of Litigation*, 5 YALE J. HEALTH POL'Y L. & ETHICS 587, 613 (2005) (critiquing arguments in favor of preemption and proposing a consultative relationship between the FDA and courts in certain products liability suits).

errors resulting from two different types of biases: ideological and interest-based. The remainder of this Part will discuss the ways that the institutional conflict supported by jurisdictional redundancy can have positive effects or at least reduce certain types of problems associated with political authority.

A. Encouraging Multiplicity

Judges have developed some procedures within the confines of a centralized litigation to encourage multiplicity. The bellwether trial is one such innovation. We saw earlier how bellwether trials were used to resolve some cases in the September 11th litigation.[105] A similar approach resulted in multiple trials in the *Vioxx* litigation. Tens of thousands of Vioxx lawsuits were filed in the United States and aggregated in one federal court and in several state courts. This massive litigation was eventually settled on the basis of sixteen lawsuits that had been tried to verdict. At the time of settlement, six of these suits had resulted in verdicts in favor of the plaintiff, and one of these was slated for retrial.[106] Juries found for the defendant in ten lawsuits, with one of these additional cases slated for retrial.[107]

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105. *See supra* notes 28-31 and accompanying text.

106. Humeston v. Merck Co., No. ATL-L 2272-03 (N.J. Super. Ct. Law Div. Mar. 12, 2007) (awarding a $47 million verdict in favor of the plaintiff on retrial); Cona v. Merck & Co., No. ALT-L-3553-05-MT (N.J. Super. Ct. Law Div. Apr. 5, 2006) (rendering a verdict for the plaintiff), *aff'd in part, rev'd in part*, No. A-0076-07T10076-07T1, 2008 WL 2199871 (N.J. Super. Ct. App. Div. May 29, 2008); McDarby v. Merck Co., No. ATL-L-1296-050MT (N.J. Super. Ct. Law Div. Apr. 5, 2006) (awarding $13.5 million to plaintiff), *aff'd in part, rev'd in part*, No. A-0076-07T10076-07T1, 2008 WL 2199871 (N.J. Super. Ct. App. Div. May 29, 2008); Ernst v. Merck & Co., No. 19961 BH02 (rendering judgment for the plaintiff in the amount of $26.1 million) (Tex. Dist. June 23, 2006), *rev'd*, No. 14-06-00835-CV, 2008 WL 2201769 (Tex. App. May 29, 2008); Garza v. Merck, No. DC-03-84 (Tex. Dist. Apr. 21, 2006) (reducing on remittitur a $32 million verdict for the plaintiff to $8.7 million), *rev'd*, No. 04-07-00234-CV, 2008 WL 2037350 (Tex. App. May 14, 2008). A new trial was ordered in *In re Vioxx Products Liability Litigation*, 448 F. Supp. 2d 737, 741 (E.D. La. 2006) (holding that a $51 million verdict awarded to the plaintiff in *Barnett v. Merck*, No. 06-485 (E.D. La. Aug. 17, 2006), was excessive).

107. *Plunkett v. Merck & Co.* was slated for retrial after a defense verdict. *In re* Vioxx Prods. Liab. Litig., 489 F. Supp. 2d 587, 588 (E.D. La. 2007). In the following cases, the jury reached defense verdicts: Dedrick v. Merck & Co., No. 05-2524, slip op. at 1 (E.D. La. Dec. 15, 2006); Mason v. Merck & Co., No. 06-810, slip op. at 1 (E.D. La. Nov. 20, 2006); Smith v. Merck & Co., No. 05-4379, slip op. at 1 (E.D. La. Oct. 4, 2006); Albright v. Merck & Co., No. 05-2316 (Ala. Cir. Ct. Dec. 15, 2006); Grossberg v. Merck 7 Co., No. BC327729 (Cal. Super. Ct. Aug. 2, 2006); Kozic v. Merck & Co., No. 03-CA-009248 (Fla. Cir. Ct. Oct. 8, 2007); Schwaller v. Merck & Co., No. 05-L-687 (Ill. Cir. Ct. Mar. 27, 2007); Hermans v. Merck & Co., No. ALT-L-5520-05 (N.J. Super. Ct. Law Div. Mar. 3, 2007); Doherty v. Merck & Co., No. ATL-L-638-05 (N.J. Super. Ct. Law Div. July 13, 2006).

It is not clear what conclusions can be reached based on this collection of cases because we have little sense of the sampling method used and the underlying variances in the population of cases being sampled. We do not know whether the sixteen sample cases were randomly selected. It is impossible to draw conclusions from a nonrandom sample because strategic decisions by the parties play a role in which cases reach trial. Some cases will be removed from the sample by settlements.[108] Defendants can delay some cases and allow others to proceed more quickly by manipulating the discovery or motion process. Similarly, plaintiffs can push some cases forward through aggressive prosecution because they think they are particularly likely to win these suits. They may not pursue risky or weak cases as vigorously.

If decision makers know the types of strategic maneuvering engaged in by the parties, they might be able to describe the ways in which the sample is skewed. For example, if defendants were settling the best cases, then we would expect the sample to be skewed in favor of defense verdicts. Similarly, if defendants were able to systematically delay the cases they perceived as posing the greatest risk of loss to them, the sample would also be skewed towards defense verdicts. On the other hand, if plaintiffs were successful in pushing only their best cases forward, we might expect that the sample misrepresents the potential win rate or award amounts of the larger population of cases.

Despite these cautionary notes, the use of statistical techniques in conducting sample trials could lead to settlements or judgments that reflect what the outcome would be if all the cases were tried to a jury.[109] Such a procedure would require the court to randomly select a number of cases for trial, and then utilize the results of those cases to

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108. Merck had asserted that it would not settle any Vioxx cases. *See* Alex Berenson, *Legal Stance May Pay Off for Merck*, N.Y. TIMES, Aug. 4, 2006, at C1 ("[L]awyers on both sides agree that Merck's victories, and its stated strategy of trying every case rather than settling any, are discouraging plaintiffs with weaker claims.").

109. *See* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 634-37 (2008). For other considerations of the topic, see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 650 (1993) (concluding that under a rights-based theory, sampling is an acceptable form of resolving mass tort cases only in instances of extreme process scarcity); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 826-30 (1992) (presenting utilitarian arguments in favor of using sample cases to resolve mass tort cases); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 546-47 (1998) (presenting efficiency arguments in favor of statistical adjudication of damages).

extrapolate outcomes for the larger population. Assuming that the variance within the population is not too great, a bellwether trial procedure could produce across a large population results approaching what a jury would find in an individual case while minimizing substantial delay costs. On the other hand, if the variance between outcomes in the population is large, then such a procedure is likely to yield an unfair distribution. Distributive justice problems are most serious in extremely heterogeneous groups. This is because people with divergent characteristics will receive the same awards under a bellwether trial procedure that uses averaging as the method of extrapolation. Those with the expectation of the highest value awards will have those awards systematically redistributed to those with the lowest value awards in the averaging process.[110]

A type of bellwether trial procedure was utilized in two cases in the early 1990s: a human rights class action and a set of consolidated asbestos cases.[111] The Ninth Circuit upheld the use of statistical adjudication in the human rights class action but a similar procedure was rejected by the Fifth Circuit in the asbestos context.[112] Since then, the procedure has only been used informally, raising concerns about strategic choice in sample selection.[113] Formal use of bellwether trials creates opportunities for divergent outcomes to surface even within a centralized litigation. When tried to a jury in the transferor court, bellwether trials allow multiple decision makers to consider cases and enable socially valuable redundancy.

B. Error and Repetition

In the sciences and social science disciplines such as statistics, reproducibility is necessary for results to be considered accurate. For

110. *See* Lahav, *supra* note 109, at 581-89; *see also* Bone, *supra* note 109, at 599 n.108 ("Sampling systematically biases outcomes in high-damage cases, thereby affecting a transfer from high to low damage plaintiffs.").

111. *See* Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 653 (E.D. Tex. 1990) (using bellwether trials in asbestos consolidation), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998); *In re* Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1464-66 (D. Haw. 1995) (using bellwether trials in human rights class action), *aff'd sub nom.*, Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996).

112. *See* cases cited *supra* note 111.

113. *See, e.g.*, Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 359–60, 372 (2d Cir. 2003) (affirming use of bellwether trial to assist in the settlement of twenty-two cases involving Legionnaires' disease on a cruise ship); Dodge v. Cotter Corp., 203 F.3d 1190, 1194, 1202 (10th Cir. 2000) (affirming use of bellwether trials to resolve a case involving uranium contamination in a community); *In re* September 11th Litig., No. 21 MC 97 (AKH) (S.D.N.Y. July 5, 2007) (opinion supporting order to sever issues of damages and liability in selected cases at 5) (ordering sample trials of volunteer cases for damages only).

example, scientific experiments must be capable of being reproduced in different laboratories. Econometricians will repeat analysis of data sets conducted by their peers in order to verify results.[114] This scientific concept is not dissimilar from the idea of the maturation of a mass tort.[115] A mature mass tort has been defined as one "where there are sufficient data points to establish the criteria and values of legitimate claims and the amount for each category of claim can readily be established."[116]

The repetition of litigation permits observers to make distinctions between cases based on legal or factual categories, to determine the potential for legal liability in these categories, and to value various categories of claims. These categories develop by repeated trials of different cases in different jurisdictions over a period of many years. Reproducing the same results in trials in different forums can thus lead to an emerging consensus on the validity and value of claims. Lawyers and insurance companies have been engaged in similar analysis since the Industrial Revolution.[117] This is in many ways also the story of the tobacco and asbestos litigations.[118] Over time, the process of mass tort "maturation" through the trial of individual cases in different jurisdictions appears to have become increasingly centralized and to have sped up. The recent *Vioxx* litigation is an example of this combination of centralization, repetition, and (relative) speed of innovation. A new term may be needed to describe its trajectory.

Judge Goodrich of the Third Circuit wrote in 1943: "A law suit is not a laboratory experiment for the discovery of physical laws of universal application . . . ."[119] When the results of redundant trials in parallel forums diverge, as occurred in the *Vioxx* cases, we learn something more than the lack of consensus. We are prompted to look

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114. For excellent examples of the importance of this work, see Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 STAN. L. REV. 1193, 1223-30 (2003); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791, 796-811 (2005).

115. The concept of a "mature" mass tort was originally proposed by Francis McGovern. *See* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

116. Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 74 UMKC L. REV. 623, 631-32 (2006).

117. *See generally* Issacharoff & Witt, *supra* note 76 (discussing the beginnings of aggregation in the practice of tort law in response to mass industrial harm).

118. *See* Deborah R. Hensler, *The New Social Policy Torts: Litigation as a Legislative Strategy—Some Preliminary Thoughts on a New Research Project*, 51 DEPAUL L. REV. 493, 494, 507-09 (2001) (describing the settlement of the tobacco cases by state governments and discussing the complex relationship between litigation and social policy).

119. Hornstein v. Kramer Bros. Freight Lines, Inc., 133 F.2d 143, 145 (3d Cir. 1943).

at the potential forum and decision-maker effects that may cause large variances. That is, we must ask whether different juries reached different results because of the plaintiff's case or because of who the decision maker was. Robert Cover explained that "[p]resented with such verdicts, one cannot easily pass judgment on questions of error . . . without first unpacking what might be called forum effects. The redundant forum causes us to focus on forum variables just as redundant testimony causes us to focus on testimony variables."[120] Cover argued that jurisdictional redundancy was too blunt a tool to increase accuracy with respect to specific issues of fact, but instead corresponds to more general political differences. Divergence or consensus will often be a reflection of political factors. Depending on the social and political context of the particular issue at stake, jurisdictional redundancy can result in an emerging consensus—such as occurred in the tobacco litigation[121]—or reflect deep social disagreements. Rather than increasing accuracy, jurisdictional redundancy offers an opportunity to examine the "kinds of problems associated with systematic political authority."[122]

C. Interest, Innovation, and Ideology

As proponents of centralization in civil procedure rightly note, jurisdictional redundancy is expensive as an institutional structure and costly to coordinate. It is important, therefore, to remind ourselves of the difficulties created by centralized political authority. Cover identified three areas where political considerations might be relevant to jurisdictional choices: interest, innovation, and ideology. He defined interest as the "self-interest of incumbent elites in a regime"; innovation as policies enacted by elites that "depart from traditional, common cultural norms and expectations"; and ideology as "the more or less unconsciously held values and ways of seeing the world, reflected in the governing elites, which tend to serve and justify in general and longrun terms the social order which the elites dominate."[123]

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120. Cover, *supra* note 12, at 656.

121. On the history of the tobacco litigation, particularly its early failures, see Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, *in* SMOKING POLICY: LAW, POLITICS, AND CULTURE 110, 110-27 (Robert L. Rabin & Stephen D. Sugarman eds., 1993).

122. Cover, *supra* note 12, at 657.

123. *Id.*

Jurisdictional redundancy matters in part because there remain geographic differences that matter in our nation. As Cover suggested, despite appearances of nationalization and an integrated economy, the United States still retains local and state-based constituencies and elites that differ from one another.[124] Our system of multiple state, local, and federal lawmakers and corporate actors at once strives for nationalization, occasionally reaches consensus, and nevertheless remains in conflict. The observation that pluralism persists even within an increasingly nationalized economy seems intuitively correct in today's political climate which focuses on the differences between "red" and "blue" states on numerous cultural and sometimes economic grounds. Elites from different geographic areas differ from one another in terms of ideology and interests. Class stratification and the increasingly distant relationship between consumers and producers and individuals and corporate groups in a global economy play a role in institutional interactions and conflicts.

Conflicts may appear to diminish as federalizing doctrines such as preemption take hold, but under the surface they continue. An influx of lawsuits arising from the marketing of a drug, for example, indicates resistance to the manner in which the federal government has enacted, enforced, and overseen regulation. This resistance comes from an elite consisting of plaintiffs' lawyers and consumer groups. A different elite, that of defense lawyers and corporations, seeks to control this area of regulation. These large-scale suits expose the conflicts between institutions (courts, legislatures, and administrative agencies) and between political entities (federal, state, and local).[125] The lines drawn between these categories are complex and evolving.

1. Interest

Perhaps the most ink has been spilled addressing the question of competing interests in mass litigation. These are usually understood as what I shall call private interests: the interests of plaintiffs in obtaining compensation or of defendants in avoiding liability. The line between private and public is hard to draw and not always the appropriate lens through which to view these questions. Compensation, for example, could be characterized as a public or a private purpose of litigation depending on whether its primary purpose is individual payment or

124. *Id.* at 657-58.

125. For a useful discussion of the relationship between the local, state, national, and federal institutions in class actions, see Resnik, *supra* note 21.

deterrence.[126] Nevertheless, I maintain the distinction for purposes of discussion. The "private" interests referred to here play out in the courts in procedural battles over jurisdiction, venue, and discovery, and in the legislature over the rules that ought to govern these concepts.[127] When "public" social interests are discussed in the scholarly literature, they are usually taken for granted.[128] It is important to remember, however, that the parameters of this category of social interests are driven by politics and ultimately ideology, and are therefore contested.

Economic analysis has provided many important insights into the concern about the operation of private interests in mass litigation, particularly with respect to the divergence between the interests of lawyers representing large numbers of plaintiffs (or absent class members) and those of the plaintiffs themselves.[129] Lawyers may be tempted to trade off the interests of their clients as a group in order to obtain a faster settlement and, perhaps, to increase their fees. The concern engendered by the agent-principal problem in plaintiff-side representation has been a staple of class action scholarship. This issue plays out similarly in the context of aggregative litigation, as mass cases are settled as a group or in classes.[130] If the proposed ALI rule permitting lawyers to solicit agreement to settlements in advance were adopted, the divergence of interests would be overtly the same in aggregation as in the class context. In reality, that structural conflict

126. *See, e.g.*, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 900-02 (1984) (characterizing the deterrence function of the tort system as a public function); William B. Rubenstein, *On What a "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2141 (2004) (discussing the relationship between deterrence and compensation).

127. For an excellent historical discussion of some of these issues, see generally EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA (2000); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 PENN. L. REV. (forthcoming 2008) (presenting a rigorous analysis of this phenomenon with respect to CAFA).

128. For an example of the use of the public/private distinction in this context, see Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive To Use the Legal System*, 26 J. LEGAL STUD. 575, 607 (1997).

129. *See* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 889-90 (1987) (discussing the "asymmetric stakes" in mass litigation).

130. *See generally* Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996) (comparing class actions and other forms of aggregate litigation and finding similarities).

already exists in "inventory" cases when lawyers are put in the position to trade off the interests of some clients against others.[131]

Centralization both serves some interests and creates others. For example, multidistrict litigation has created networks of plaintiffs' attorneys who communicate with one another, share strategies, and sometimes pool resources.[132] If the plaintiffs' lawyers in charge of the Plaintiff's Management Committee (PMC) do a good job, this can benefit all the participants. But if there is a divergence of interests between groups of plaintiffs, this can lead to internecine fighting. Leading lawyers stand to gain both financially and in prestige from the consolidation of power that aggregation enables and the ability to leverage that power. Lawyers on both sides are repeat players in aggregate litigation. As a result, the interest in centralization may become entrenched, especially in particular areas of specialization such as pharmaceutical products liability litigation.

It is important, however, not to forget the role of institutional interests. Legislatures may sometimes have an interest in creating rights that will be enforced by courts rather than by administrative agencies, in order to make reforms more politically palatable.[133] Judges may wish to reduce their dockets by consolidating cases and shifting resolution to private parties.[134] If groups of judges are ideologically linked to certain political power elites, there is a concern that they will decide cases according to their affiliation. As Thomas Jefferson, who had reason to worry about combinations of judicial and political power in the hands of a single bloc, explained: "But we all know that permanent judges acquire an Esprit de corps" and may be tempted by bribery and misled "by a spirit of party, by a devotion to the Executive or Legislative," and "[i]t is left therefore to the juries, if they think the permanent judges are under any biass [sic] whatever in

131. *See* Charles Silver & Lynn Baker, *I Cut, You Choose: The Role Of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1471 n.20 (1998).

132. *See* Stier, *supra* note 75, at 896 (describing the growing informal networks among plaintiffs' lawyers in mass tort litigation).

133. *See, e.g.*, R. Daniel Kelemen, *Suing for Europe: Adversarial Legalism and European Governance*, 39 COMP. POL. STUD. 101, 102 (2006) (suggesting that to achieve regulatory goals in a liberalized environment, policy makers rely more on private enforcement).

134. I discuss this phenomenon and its implications in Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 388-90 (2007).

any cause, to take upon themselves to judge the law as well as the fact."[135]

The overlap and allocation of jurisdiction between judge and jury in the Bill of Rights, for example, was not only a matter of tradition or natural rights, but a political artifact driven by local and state debtor interests in conflict with the federal government's interest in repaying British creditors.[136] In recent memory, the transfer of jurisdiction over national class actions from state to federal courts seems to have been driven by a hope that the federal courts will be more friendly to defendants and a belief that state courts favored plaintiffs too strongly.[137] Similarly, Rule 23(f), which permits interlocutory appeal of class certification decisions, can be considered a form of strategic choice created to curb the power of particular interests. Evidence shows that appellate judges are more likely to reverse certification decisions.[138] This type of interest is more aptly described as "ideology," a concept addressed in the next section.[139]

Can multiplicity provide a counterpoint to the entrenchment of interests represented by centralization? The existence of multiple centers for litigation, as occurred in the *Vioxx* cases, could result in multiple centers of power both in the court system and the plaintiff's bar. The risk of collusion may be reduced by multicenteredness because competition will make it more difficult for defendants to buy off plaintiffs' counsel at the expense of the class. Compare multiple multidistrict litigations (in state and federal court) with the class action. Under certain conditions, the class action device can allow defendants to purchase global peace at a reduced rate if they are able to negotiate a class-wide settlement with a given class counsel. Global peace is

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135. Letter from Thomas Jefferson to Abbé Arnoux (July 19, 1789), *in* 5 THE FOUNDERS' CONSTITUTION 363, 364 (Philip B. Kurland & Ralph Lerner eds., 1987). Jefferson's concerns may have been a product of his rivalry with Justice Marshall, a staunch Federalist. For an excellent treatment of this relationship, see R. KENT NEWMYER, JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT 146-209 (2001).

136. *See* Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 169–76 (2001) (describing the role of the politics of debt before and after the Revolution in the establishment of the jury right).

137. For a description of the lobbying efforts in CAFA, see Purcell, *supra* note 127.

138. There is evidence that appellate courts reverse certification decisions more often than they affirm them and that some circuits are more inclined to reverse than others. *See* Richard Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 34 W. ST. U. L. REV. (forthcoming 2008).

139. Cover usefully presents interest as a continuum. Interests such as individual financial gain are represented at one end of the spectrum. The "bonds of ideological identification" which may drive some institutional interests are on the other end. Cover, *supra* note 12, at 660.

harder to obtain in the aggregation context, though not impossible, as the *Vioxx* settlement illustrates.

Next consider the possible negative effects of informal coordination between several multidistrict litigations. This can happen when judges communicate with one another about the timing of discovery and decisions regarding dispositive motions. These types of strategic manipulations may lead to settlement. Instead of having multiple centers of decision making, such coordination may result in de facto centralization and the entrenchment of power in the hands of a limited set of players. Such unchecked power opens up the potential for abuse because settlements in aggregate litigation require no formal approval. Perhaps this is why judges sometimes evaluate settlements even in a nonclass setting. The perception is that parties will not agree to settlements of which the presiding judge disapproves, even if the judge lacks formal power over the settlement.[140]

Additional monitoring is the natural solution to the potential for abuse created by centralization.[141] But monitoring is only as good as the monitors themselves, which is why some scholars have focused largely on incentive-based changes to the class action regime, and particularly on attorney's fees.[142] In the multidistrict litigation setting, the ability of litigants to strategically choose different forums to the extent they can do so will not solve the problem of biased judges or alter the incentives to reach a suboptimal settlement. Instead, it will lead to different decisions in different courts and thereby provide counterpoints to the bias of a particular set of judges or lawyers. If a litigant believes that the judge in a particular forum is biased, the ability to file or transfer the case to another forum to receive a fair hearing is significant.[143] This assumes, of course, that there is some variation among judges in different aggregate settings.

Multiplicity is not a cure for the problems caused by the prevalence of private interests in litigation. It merely destabilizes the

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140. DVD: The Problem of Multidistrict Litigation: Bellwether Trials and Settlement Devices (Tulane Law Review 2008) (statements by Judge Eldon E. Fallon) (on file with the Tulane University School of Law Library).

141. *See* Alexandra Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 106-08 (2003) (noting that scholars and judges have argued for increased judicial monitoring to limit class action abuses).

142. *See, e.g.*, Coffee, *supra* note 59, at 424. For an innovative fee regime, see Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 107-19 (2004) (proposing a system of auctioning off the right to represent a class that included a fee structure imposing substantial penalties on class counsel, thus guaranteeing loyalty).

143. *See* Cover, *supra* note 12, at 661.

ability of some interests to completely control the litigation. In this way it is a weapon against control by particular interests. As Cover explained in his consideration of the subject, "This structure is not in general useful for the imposition of determinate solutions. . . . It is an approach to dilemmas of suspicion and uncertainty, not a [formula] for clear-cut answers."[144]

2. Innovation

The ability of states to innovate new approaches to law is one of the basic arguments in support of our federalist system. As Justice Holmes lamented in *Truax v. Corrigan*, "There is nothing that I more deprecate than the use of the Fourteenth Amendment beyond the absolute compulsion of its words to prevent the making of social experiments that an important part of the community desires, . . . even though the experiments may seem futile or even noxious to me . . . ."[145] Or as Justice Brandeis famously explained, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[146] That argument has not been a vigorous one since the New Deal.[147] This is the case in part because increasing interdependence has reduced the number of experiments that can be engaged in "without risk to the rest of the country" to a very few.

The threat of instability in the national economy that may result from competing legal regimes has been the subject of both substantive legislation and procedural reform. Samuel Issacharoff and Catherine Sharkey have shown that the application of jurisdictional doctrines has centralized decision making in the federal government and federal courts.[148] As these authors point out, centralizing cases in a particular forum in the absence of a uniform law causes instability.[149] To resolve

144. *Id.* at 662.

145. 257 U.S. 312, 344 (1921) (Holmes, J., dissenting).

146. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* David Marcus, Erie, *the Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1271 (2007) (describing the Progressive preference for state rather than federal regulation and the reasons therefore).

147. For a rich discussion of the decline of localism following the New Deal and the potential for reinvigorating it, see Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920-1940*, 90 IOWA L. REV. 1011, 1013-19 (2005).

148. Issacharoff & Sharkey, *supra* note 56, at 1420.

149. *Id.* at 1429.

this instability, courts may coordinate the substantive law within the centralized forum.[150]

Centralization is not the only means for reaching consensus. In a multicentered system, consensus may be reached through "confirmatory redundancy."[151] When multiple sources of authority articulate the same norms, those norms obtain additional power. The theory of maturation of a mass tort is an example of the development of confirmatory redundancy over time.[152] Bellwether trials are another model for creating confirmatory redundancy in a collapsed time frame.

But bellwether trials are not as good a tool for resolving cases where substantial disagreement persists. If juries reach widely varying results, then the averaging process will result in systematic wealth transfer from the highest value cases to the lowest value cases. This criticism assumes that the size of the verdict is related to the quality of the case. If those plaintiffs most harmed would lose the most value in the process of averaging, this outcome is indeed unfair. If the variance is due to factors only tangentially related to entitlement, such as preexisting prejudice against classes of claimants, then redistribution may be more acceptable. The fairness of a bellwether trial procedure will depend, therefore, on the degree of societal agreement on outcomes and the effects of ideology on the decision-making process.

The problem with relying on confirmatory redundancy in many cases is a lack of consensus. Disagreement, especially on issues of social importance that cross state lines, is what drives the concerns articulated by proponents of centralization. This disagreement is unavoidable. And although centralization promises uniformity, it cannot promise the best decisions. Consider for a moment the regulation of pharmaceuticals. Ostensibly, pharmaceuticals are regulated ex ante by the Food and Drug Administration. In recent years, the FDA has increasingly come under fire for failing to regulate and therefore permitting drugs to be administered in ways that cause patients harm.[153] This regulatory failure led to substantial numbers of

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150. *Id.* at 1420.

151. Cover, *supra* note 12, at 674-75.

152. *See* McGovern, *supra* note 115, at 688–94.

153. *See generally* MARCIA ANGELL, THE TRUTH ABOUT THE DRUG COMPANIES: HOW THEY DECEIVE US AND WHAT TO DO ABOUT IT (2004) (recounting the FDA's failures). In an investigative report, the *Los Angeles Times* found seven drugs that were approved by the FDA posed risk to human life that far outweighed any potential benefit. David Willman, *How a New Policy Led to Seven Deadly Drugs*, L.A. TIMES, Dec. 20, 2000, at A1; *see also* ALICIA MUNDY, DISPENSING WITH THE TRUTH: THE VICTIMS, THE DRUG COMPANIES, AND THE

lawsuits. For instance, the harms caused by the diet drug Phen-Fen resulted in 18,000 lawsuits.[154] Some were transferred under the auspices of the JPML.[155] Other individual tort cases proceeded in state courts. Yet other cases sought class certification in state and federal court.[156] The result of regulatory failure at the agency level, where the greatest potential for centralization was to be had, led to large-scale litigation around the same drug and a proliferation of cases in state and federal courts brought on aggregated, class, and individual bases. Ultimately, the *Diet Drugs Litigation* settlement ballooned to $20 billion and was heavily criticized.[157] At the same time, courts and legislatures have expanded preemption doctrine to limit certain types of claims in pharmaceutical litigation, further consolidating agency power.[158] This litigation illustrates that centralized decision making is as subject to capture and abuse as multicentered decision making. Disagreement and inconsistency may also reflect the inherent instability of economic and social life, rather than being its cause.

To say that neither centralization nor multiplicity guarantees good policies tells us very little. The specific virtue of pluralism is that it offers multiple solutions, increasing the chances of getting some outcomes right. Cover called these multiple norms "nonconfirmatory redundancy."[159] The problem with a state of nonconfirmatory redundancy is in the purchase of variety. What are we to do with the different results reached in different labs?[160]

DRAMATIC STORY BEHIND THE BATTLE OVER FEN-PHEN (2001) (describing the events that led to the *Diet Drugs* litigation).

154. *In re* Diet Drugs Prods. Liab. Litig., Nos. 1203, 99-20593, 2000 WL 1222042, at *3 (E.D. Pa. Aug. 28, 2000).

155. These were consolidated under MDL 1203. *See In re* Diet Drugs Prods. Liab. Litig., No. MDL 1203 (J.P.M.L. Jan. 6, 1998) (amended transfer order).

156. *In re Diet Drugs*, 2000 WL 1222042, at *3 (describing a national medical monitoring class action certified in MDL court, and medical monitoring class actions certified in Illinois, New Jersey, New York, Pennsylvania, Texas, Washington, and West Virginia).

157. *See* Alison Frankel, *Still Ticking: Mistaken Assumptions, Greedy Lawyers, and Suggestions of Fraud Have Made Fen-Phen a Disaster of a Mass Tort*, AM. LAW., Mar. 2005, at 92, 94.

158. Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347-53 (2001) (holding that "fraud-on-the-FDA" claims are preempted); Ledbetter v. Merck & Co., No. 2005-59499 (Tex. Dist. Apr. 20, 2007) (order granting defendant's motion for partial summary judgment and granting expedited appeal at 9) (holding that plaintiffs in Vioxx lawsuits may not assert fraud on the FDA claims under TEX. CIV. PRAC. & REM. CODE ANN. § 82.007(b)(1) (Vernon 2005), which permits plaintiffs to rebut a presumption against liability if a warning was approved by the FDA if the plaintiff can show that the defendant misled the FDA).

159. Cover, *supra* note 12, at 675.

160. "The social laboratory metaphor does not tell us how the results of 'experiments' in one lab come to claim the attention and deliberative energies of another." *Id.* at 676.

One answer is to continue with plural decision making and hope that a consensus emerges over time. Such consensus might emerge because courts communicate with one another. Direct coordination of decisions in multiple courts may work against pluralism. But encouraging communication will permit courts to reevaluate decisions and perhaps reach consensus. Multicentered litigation may, over time, create "a density of experience that produces information quickly with simultaneous, interactive effects of decision and environment."[161] Dialogue between courts could result in better decisions, in part because dialogue helps judges determine what questions to ask in addition to what answers to give.[162] A decision on electronic discovery or the admissibility of expert testimony in a state court overseeing aggregated cases, for instance, will be known to other courts overseeing a set of similar cases. The one court may not necessarily adopt the decision of the other (nor should it merely for the sake of uniformity) but it could learn from that decision. Such near simultaneous decision making could make second thoughts and reevaluation more likely, and perhaps in so doing increase fairness to litigants.

The balance between collaboration and independent judgment is a delicate one. Due process requires judges to retain their independence and permit litigants to be heard in the process of making decisions. At the same time, paying attention to what other judges are doing can provide counterpoints to the judge's own preconceptions and increase the possibility of reaching the most just outcome.

3. Ideology

The term *ideology* as used here refers to the unarticulated assumptions about the world adopted by different groups.[163] For example, prominent scholars have shown that across a range of controversial issues there are systematic differences in voting patterns between federal appeals judges appointed by Democratic Presidents

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161. *Id.* at 678.

162. This point was brought out at the Symposium in the remarks of the Honorable Carol Higbee, a New Jersey trial judge in whose courtroom the New Jersey Vioxx cases were consolidated. She described her positive interactions with Judge Eldon Fallon, the federal MDL judge in the Vioxx cases. DVD: The Problem of Multidistrict Litigation, *supra* note 140 (statements by Judge Carol Higbee).

163. This is admittedly a rather simplistic view of ideology, a subject the immense complexity of which is beyond the scope of this work. For the limited purpose of the thesis of this Article, however, I think the reader will find that this simple definition suffices.

and those appointed by Republican Presidents.[164] Scholars of cultural cognition have provided empirical evidence of differences of opinion among individual members of various social groups.[165] These different world views can cause mistrust and form the basis of social conflict among these groups. Adjudication is one space where these social conflicts are worked out. As Robert Cover explained, "[A]djudication can always become a ritualized enactment of the epistemological chasms between one class and another, one race and another, one gender and the other; between different generations, different nations; and between city and country, town and gown."[166] And, one might add, in the context of many mass torts, between consumer and corporation.

Conflict can arise along many different lines within the court system. For example, the decision to allocate decisions to the judge or the jury in a given trial can be seen as a function of assumptions about the abilities of lay jurors to understand complex information. There may be differences in decisions of state and federal judges on the same legal issues that arise out of different assumptions about the world based on life experience, social status, or other factors. There may be systematic differences, as well, between district and appellate court judges in the federal or state court systems.

Consider first the judge and the jury. Judicial and jury functions present an example of sequential redundancy. A judge may determine that there are no material issues of fact in dispute on a motion for summary judgment, thereby taking the power to determine those facts away from the jury.[167] After a jury has reached its verdict, a judge may

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164. *See* CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17-46 (2006).

165. Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes Are You Going To Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. (forthcoming 2009) (documenting differences of opinion regarding legally relevant facts along cultural, ideological and other lines).

166. Cover, *supra* note 12, at 664. As Paul Schiff Berman explains, "[T]rials, with their elaborate procedures and formal rules, create a mythic arena for expressing the great tensions and moral battles of the community." Paul Schiff Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 292-93 (1994).

167. *See* FED. R. CIV. P. 56; EDWARD BRUNET & MARTIN H. REDISH, SUMMARY JUDGMENT: FEDERAL LAW AND PRACTICE § 2:1, at 16 (3d ed. 2006). The fact/law distinction is notoriously slippery. One might argue in response that because there are no disputes of material fact, there is really nothing for the jury to decide. However, the very question of whether there are disputes or not can be considered a question of fact. *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 153-61 (1970); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982, 1062 (2003) (discussing and critiquing the fact/law distinction in the summary judgment trilogy).

invoke the doctrine of remittitur to require that the plaintiff accept a lower amount or proceed to a new trial.[168] Because trials are costly, plaintiffs rarely opt to retry these cases,[169] effectively permitting the judge to dictate the verdict where she finds it is unreasonable.[170]

Judges may also essentially determine case outcomes by their evidentiary rulings. In cases where expert testimony is central to one or the other party's case, the outcome of the case may hang on how the judge exercises her "gatekeeping" function of determining admissibility of expert testimony.[171] This observation is not limited to cases involving scientific evidence. Recall that in the *September 11th Litigation*, Judge Hellerstein ordered several of the bellwether cases to be tried for damages first in order to assist the parties in reaching settlement.[172] The judge's early ruling on a defendant's motion in limine spurred many of the cases to settlement. Discovery orders may also influence the outcome of a case, especially in light of the expense of electronic discovery. Thus, judicial control of the pretrial phase of a case is critical to its outcome. As we shall explore in a moment, this

168. *See* FED. R. CIV. P. 59; Dimick v. Schiedt, 293 U.S. 474, 485 (1935) (upholding remittitur); *see also* 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2815, at 160 (2d ed. 1995) (describing remittitur as "a practice, now sanctioned by long usage, by which the court may condition a denial of the motion for a new trial upon the filing by the plaintiff of a remittitur in a stated amount").

169. *See* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 793 (2003) (presenting evidence that "plaintiffs take the remittitur or settle in 98% of the cases in which a judge grants a remittitur").

170. The legal standard for remittitur under federal law is whether the jury award "shocks the conscience." *See, e.g.*, Kirsch v. Fleet Street, Ltd., 148 F.3d 149, 165 (2d Cir. 1998) (stating that a compensatory damage award may be set aside if "'the award is so high as to shock the judicial conscience and constitute a denial of justice'" (quoting O'Neill v. Krzeminski, 839 F.2d 9, 13 (2d Cir. 1988))). However, federal judges sitting in diversity must apply the standard dictated by state law, which may give the judges more power. *See* Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 425, 430-31 (1996) (requiring federal courts to apply the more restrictive New York standard of whether the jury's award "deviates materially from what would be reasonable compensation" (internal quotation marks omitted)).

171. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 596-97 (1993) (requiring that only "good" scientific evidence should reach the jury); *see also* Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1265-67 (2007) ("[T]he *Daubert* regime requires that judges critically examine an expert's methodology and conclusions with 'exacting standards.'"); Edward J. Imwinkelried, *Trial Judges—Gatekeepers or Usurpers? Can the Trial Judge Critically Assess the Admissibility of Expert Testimony Without Invading the Jury's Province To Evaluate the Credibility and Weight of the Testimony?*, 84 MARQ. L. REV. 1, 40-41 (2000) (discussing the significance of *Daubert* and arguing that reform of the judicial function is needed).

172. *See* supra notes 29-33 and accompanying text (describing the procedural history of *In re September 11th Litigation*).

fact underscores the significance of centralizing power in transferee courts.

The popular conception is that there is a difference between judges and juries.[173] Large jury verdicts are often the subject of press accounts and, in the case of punitive damages, increasingly the subject of United States Supreme Court review.[174] Some think that jurors hold a different set of assumptions and values than judges by virtue of the fact that jurors are not members of a professional judicial class, are mostly not trained as lawyers, and have different cultural and economic backgrounds than most judges. Nevertheless, empirical evidence indicates that jurors are at least as educated as the general population.[175] Over the last fifty years, studies have consistently shown that judges and juries agree on outcomes in civil cases most of the time.[176]

The real differences may be between legislators and actors in the judicial branch, including juries and judges. Consider the case of *Garza v. Merck*, tried in Texas state court.[177] The jury reached a verdict of $7 million in compensatory damages and $25 million in punitive damages. The judge remitted the punitive damages award to $1.6

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173. *See* Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 584 (1998) (discussing this perception and showing that differences in win rates between judges and juries are the product of case selection); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism*, 77 CORNELL L. REV. 1124, 1126 (1992) (describing the differences between litigant perceptions and reality about judges and juries).

174. *See* Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007) (holding that a punitive damages award based in part on a jury's desire to punish the defendant for harm to nonparties violated the Due Process Clause); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 415, 429 (2003) (holding that a $145 million punitive damages award (later reduced to $25 million) was grossly excessive in light of a $2.6 million compensatory damages award) (later reduced to $1 million); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562-63, 580 (1996) (holding that a $4 million punitive damages award (reduced to $2 million on appeal) was "grossly excessive" and violated the Due Process Clause). *Exxon Shipping Co. v. Baker*, No. 07-219, 2008 WL 2511219, at *4 (U.S. 2008), decided as this Article went to press, raises similar issues under the common law.

175. *See* Hillel Y. Levin & John W. Emerson, *Is There a Bias Against Education in the Jury Selection Process?*, 38 CONN. L. REV. 325, 328, 346-47 (2006) (presenting an empirical study finding that Connecticut jurors are not less educated than the general population, and perhaps are even better educated than the general population).

176. *See* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 117 (1986) (citing a study indicating that judges and juries agreed on an outcome seventy-eight percent of the time, and that the remaining twenty-two percent of the time, their disagreement was balanced between plaintiffs and defendants); Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 779 (2002) (presenting an empirical study showing that juries and judges largely agree on punitive damages awards).

177. No. DL-03-94 (Tex. Dist. Apr. 21, 2006), *rev'd* No. 04-07-00234-CV, 2008 WL 2037350 (Tex. App. May 14, 2008).

million to bring the verdict in line with local statutory limits on punitive damages. Perhaps the divergence was not between judge and jury but the legislative and judicial branches. Given that the remittitur was legislatively driven, perhaps the professional class and the rest of the population in a given geographical area operate on a set of assumptions that are not so different after all. We may see a divergence of opinion on socially contested issues between legislative and judicial institutions because juries are faced with a concrete case whereas legislators deal in abstractions. The conflict between these institutions seems to me necessary to stimulate a societal debate about these important issues. It may also be that if there is a divergence between jury verdicts and judicial decisions, disagreement exists where the social conflict is most likely to arise, such as awarding punitive damages or determining causation. Both of these questions present significant social issues. It is not surprising that they might be the subject of conflict.

If judges and juries mostly agree, does the jury add anything to the adjudication process? The jury has what some have termed the "pluralist" function of representing a cross section of the community.[178] Juries can be a microcosm of societal disagreements. Jury service can lead to consensus through deliberation. Or it can lead to conflict, the surfacing of insurmountable differences, and even a mistrial. Moreover, juries in different jurisdictions may reach different results from one another in very similar cases. It is difficult to measure these differences, because the facts of even similar cases can differ. Local factors, such as the extent to which the plaintiff is likeable or the advocate more talented than average, can explain some differences. It is nevertheless plausible to say that different juries may reach different conclusions with regard to the same case if it were presented the same way. These conclusions may, in turn, be the result of fundamental differences between the juries as to basic assumptions about the world, in other words, differences in ideology.

Multiple juries hearing similar cases present an instance of synchronic redundancy. When jury verdicts in aggregate cases are collected, they may yield an emerging consensus about liability and/or damages. Or the verdicts may reflect substantial social conflict. Recall the spread of the Vioxx verdicts at the time of settlement: six verdicts in favor of the plaintiff, ten defense verdicts, and three cases

178. *See* Jeffrey Abramson, *Two Ideals of Jury Deliberation*, 1998 U. CHI. LEGAL F. 125, 126-33 (describing the "pluralist ideal" for a jury's function).

awaiting retrial.[179] Differences in state laws could account for some divergence, but even cases tried in the same jurisdiction reached widely varying results. The four New Jersey Vioxx trials were equally split between substantial plaintiff's awards and defense verdicts.[180] Of course, this split could mean many different things. But one potential meaning is that society is undecided about basic issues of responsibility for adverse outcomes in patients prescribed pharmaceuticals.

The horizontal redundancy found in multiple juries and vertical redundancy found in judicial and jury decision making may correct for ideological bias by testing out premises in different forums. Divergent outcomes in different forums may not be an example of mere error in the sense of a failure to apply the law accurately to the facts at hand or an incorrect finding of fact. Instead, divergence may represent different ways of viewing the world and different assessments of value based on cultural values and background assumptions.[181] Jury verdicts will come out differently more often in cases where there is social conflict over the issue presented. Judges and juries may differ more often over issues where social conflict is at its apex. We should therefore expect to see divergence most when redundancy is at its most useful.

Differences in decision making between state and federal judges may also be the product of ideology. One empirical study appears to show that "win" rates for plaintiffs were lower in cases that had been removed to federal court than in cases that remained in the initially filed state court.[182] Another showed that federal judges were more likely to deny certification of class actions, although state and federal

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179. *See* cases cited *supra* notes 106-107.

180. *See* cases cited *supra* notes 106-107.

181. Cultural historians have convincingly shown that ideas about value change over time. *See* VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN (1994) (describing the changing views of the value of children over the nineteenth and twentieth centuries); *see also* Bassett, *supra* note 97, at 394 ("The notion of 'one proper result' is an erroneous premise in light of the potential differences in the applicable law, the vagaries of fact investigation and discovery, the potential for lawyer error or poor tactical choices, and the necessity in fully litigated cases for formal factfinding—factual determinations that shape both liability and damage outcomes.").

182. Clermont & Eisenberg, *supra* note 173, at 607. This study found that removal reduced plaintiff's win rate by approximately fifty percent. In nonremoved diversity cases plaintiff's win rate was seventy-one percent whereas in removed cases it was thirty-four percent. The study attempted to disaggregate the case selection effect from the forum selection effect, and found that when controlling for the case selection effect, plaintiffs win rate was still eleven percent lower, a reduction attributable to forum effects. The study was based on an assumption of a win rate of fifty percent. *Id.* at 592-607.

judges were equally likely to certify a class.[183] The reason for these differences may be that state courts will sit on certification motions, leaving them in limbo, whereas certification is more often adjudicated and appealed in the federal system. There is empirical evidence that state judges are less likely than federal judges to entertain preemption claims, although these claims are gaining some traction in state courts.[184] These studies seem to support the contention that there are, in some cases, differences between the treatment of similar cases in state and federal court.

Not all of these differences can be attributed to different procedural regimes, as many states have adopted the basic language of Federal Rule of Civil Procedure 23 as well as other aspects of the Federal Rules. Some of these differences between state and federal judges are likely due to ideological factors. Assume for the moment that case selection is not the deciding factor in these divergent outcomes, recognizing that this cannot be conclusively proven. If there is an ideological divergence between state and federal judges, for example, then jurisdictional redundancy will promote fairness by limiting the ability of a particular group to wield power over litigants.

V. HOW MUCH MULTIPLICITY CAN A SYSTEM TOLERATE?

Our national commitment to jurisdictional pluralism and to intrainstitutional competition is embedded in the United States Constitution, which creates two competing court systems with jurisdiction over the same cases and retains power to the local civil jury within the federal system.[185] Our system of adversarial adjudication ensures that litigants will utilize jurisdictional redundancy to their advantage. The question facing judges, scholars, and policy makers

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183. *See* THOMAS E. WILLGING & SHANNON R. WHEATMAN, ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS 4-5, 7-8, 18, 29-31 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/amort02.pdf/$file/amort02.pdf. The study shows that defense attorneys believe that in class action cases the federal forum is more beneficial to their clients' interests and that they remove cases based on state law to the federal courts for that reason. *Id.* at 4.

184. *See* Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1017-20 (2007) (discussing an unpublished study and potential explanation for differences between state and federal courts, including closer relationship between federal courts and federal administrative agencies such as the FDA).

185. *See* U.S. CONST. art. III (creating inferior federal courts and diversity jurisdiction); *id.* amend. VII (preserving a civil jury right).

now is not whether we will have such a system, but how much pluralism we are willing to tolerate. Lately the most prevalent view has been that pluralism ought to be minimized in favor of centralization. In light of this movement, the question might also be put another way: how much centralization should we permit in a pluralist society?

A. Weighing Costs and Benefits

The value of multicentered litigation is that it preserves competition between institutions and recognizes the legitimacy of different points of view. As a result, society retains access to multiple visions of what constitutes beneficial social policy, alternative outcomes with respect to contested social issues, and the potential for rethinking assumptions and strongly held ideals that may, on reflection, be flawed. Multicentered litigation promotes innovation and critical thinking, two important criteria for creating good policies. Finally, multiplicity prevents error from taking hold.

Centralization has many benefits as well. Courts are, or claim to be, strapped for resources, and many cases are repetitious or routine.[186] In some cases, uniformity is necessary to protect important governmental powers and interests, although this too comes at a cost.[187] Producers in a global economy seek legal certainty and consistency, values that cannot be achieved in a legal regime that allows different jurisdictions to reach different outcomes.[188] Finally, centralization may limit litigants' ability to engage in procedural and jurisdictional manipulation. By contrast, multiple forums can permit reverse auctions in class actions and other strategic manipulations of the rules.

How can courts weigh the relative value of these costs and benefits? Whether centralization or multicenteredness is the best approach can only be determined in context. When entities such as the JPML have the discretion to decide whether to centralize, they should consider the following factors: (1) the extent of underlying substantive disagreement, (2) the costs of inconsistency, and (3) the role of political power in the dispute.

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186. *See* Galanter, *supra* note 68, at 1132-34 (presenting evidence that calls assumptions about increasing docket size into question).

187. *But see* Amanda Frost, *(Over)valuing Uniformity*, 94 VA. L. REV. (forthcoming 2008) (debunking arguments in favor of uniformity and arguing that courts should avoid expending resources to standardize federal law merely for the sake of achieving uniformity).

188. *But cf.* Berman, *supra* note 20, at 1162 (discussing and critiquing attempts to "solve" problem of hybridity through harmonization).

First, to what extent is there disagreement as to the substance of the law? If there is substantial disagreement, then allowing multicentered litigation will be valuable in the development of the law. If there is largely consensus, centralization is more appropriate and perhaps even desirable to prevent the "outlier" problem. Second, are the questions to be decided of the type that inconsistent adjudication will result in substantial harm to the litigants or the legal system? If inconsistent adjudication will cause significant harm, centralization is more appropriate than in a case where inconsistent adjudications will not have far-reaching negative consequences. Third, is there a legitimate concern that judicial or jury decisions in the particular legal area will be influenced by ideology in ways that will be unfair to particular sets of litigants? Ideological tilt will favor multiplicity in order to prevent error from taking hold and to mitigate the problems of political authority.

To understand how these factors might be applied in practice, let us consider two hard cases. These cases are hard because they present controversial substantive questions and conflicting values. The factors described above will either help resolve these conflicts in favor of a single forum or show that the continuation of these conflicts is in fact desirable. The three-factor test may not resolve the value conflict that is at the heart of the debate about centralization, but it brings to the surface what is really at stake in eliminating redundancy. In so doing, the test forces judges and policy makers to consider the costs of centralization and the benefits of pluralism.

B. FDA Preemption of State Failure To Warn Claims

Preemption is a controversial issue that is the subject of substantial debate. Several cases considered by the Supreme Court this term present this issue, though it is unlikely to be definitively resolved soon.[189] In *Warner-Lambert Co. v. Kent*, an equally divided

189. *See* Warner-Lambert Co. v. Kent, 128 S. Ct. 1168, 1168 (2008) (per curiam); Riegel v. Medtronic, Inc., 128 S. Ct. 999, 1007-11 (2008); Levine v. Wyeth, 2006 VT 107, ¶¶ 6-34, 944 A.2d 179, 183-94 (2006), *cert. granted*, 128 S. Ct. 1118 (2008) (No. 06-1249). For some different views on the issue, see David Kessler & David Vladeck, *A Critical Examination of the FDA's Efforts To Preempt Failure-To-Warn Claims*, 96 GEO. L.J. (forthcoming 2008) (arguing against FDA preemption); Peter Schuck, *FDA Preemption of State Tort Law in Drug Regulation: Finding the Sweet Spot*, 13 ROGER WILLIAMS U. L. REV. (forthcoming 2008) (arguing in favor of preemption with some caveats); Catherine Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. Rev. (forthcoming 2008) (proposing an agency reference model whereby courts will look to agencies to provide data as to whether preemption is appropriate).

Court affirmed the ruling of the United States Court of Appeals for the Second Circuit, which had held that the Food, Drug, and Cosmetic Act (FDCA) does not preempt product liability claims under Michigan law against drug manufacturers that allegedly defrauded the FDA.[190] The case has no precedential value except in the Second Circuit, from whence it came.[191] There is a circuit split on this contentious issue of law, public policy, and public health that the Court failed to resolve. As a result, failure to warn cases brought in some circuits are preempted and will be dismissed (if they are brought at all) and cases brought in other circuits will be permitted to go forward.[192]

Because tort suits arising out of the use of pharmaceuticals often come in large numbers, it is likely that numerous suits arising out of similar facts and bringing these types of claims will be brought. Sooner or later, the JPML will be asked to transfer these many cases to a single court. Then the Panel will be faced with a choice of where to transfer the cases: to the circuit that has ruled in favor of preemption and would dismiss the claims, to the circuit that has ruled against preemption and would let the claims go forward, or to a circuit that has yet to rule on the issue.[193] The Panel's choice will determine what happens to the cases because the transferee court is empowered to apply the law of its own circuit to all pretrial rulings, theoretically including motions to dismiss.[194]

In *In re Korean Air Lines Disaster*, the case that articulated the rule that the transferee court apply the law of its own circuit, then-Judge Ruth Bader Ginsburg gave three reasons for allowing the transferee court's law to apply: (1) "[a]pplying divergent interpretations of the governing federal law to plaintiffs, depending solely upon where they initially filed suit, would surely reduce the efficiencies achievable through consolidated preparatory proceedings"; (2) "because there is ultimately a single proper interpretation of federal law, the attempt to ascertain and apply diverse circuit interpretations

190. *Kent*, 128 S. Ct. at 1168.

191. *See* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 215 n.1 (1995).

192. *Compare* Garcia v. Wyeth-Ayerst Labs., 385 F.3d 961 (6th Cir. 2004) (affirming summary judgment in favor of the defendant), *with* Desiano v. Warner-Lambert & Co., 467 F.3d 85, 98 (2d Cir. 2006) (remanding a case for further proceedings), *aff'd sub nom. Kent*, 128 S. Ct. at 1168.

193. This discussion is inspired by the analysis of Mark Herrmann and Jim Beck. *See* Drug and Device Law, There Ought To Be a Law (An Odd Implication of *Kent*), http://druganddevicelaw.blogspot.com/2008/03/there-oughta-be-law-odd-implication-of.html (Mar. 5, 2008 7:42 EDT).

194. *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1175 (D.C. Cir. 1987).

simultaneously is inherently self-contradictory"; and (3) the parties could always seek review by the Supreme Court for an authoritative and final interpretation.[195] That last condition, of course, was not met in this case because the Supreme Court had the opportunity to decide and instead preserved the circuit split. After *In re Korean Air Lines Disaster*, at least one district court has reviewed the issue and held that questions that are not "merely pretrial" issues should be decided based on the law of the *transferor* court.[196] The judge explained, "[N]either party should be prejudiced in preparing for trial because the case was removed and transferred to another district in a different circuit."[197] But there has been no final pronouncement on the question of which circuit's law applies to cases transferred under the auspices of the JPML.

Consider how the three-factor test might apply if the Panel were to consider transferring cases raising state law failure to warn claims. First, to what extent is there disagreement as to the substance of the law in this case? This is a situation where the substance of the law is hotly contested. Disagreement is substantial, and the issue is one of significant importance to patients, drug companies, and the federal government. The disagreement at its root is about important structural issues: to what extent will states have the power to regulate pharmaceutical companies? It also implicates economic issues, such as to what extent permitting states to regulate this national industry damages the national economy.

Second, is the question to be decided such that inconsistent adjudication will result in substantial harm to the litigants or the legal system? Arguably the preemption question is not of the type that substantial harm would be caused by inconsistent adjudication. In fact, our legal system is quite able to tolerate multiple outcomes in the same type of case in different states. If substantial harm was forthcoming, it is likely that the Supreme Court would have found a way to agree on a uniform principle. Inconsistency is an inconvenience for defendants and some plaintiffs, but it is unlikely to do substantial harm to the national economy. We know this because the circuits have been operating under different rules for some time.

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195. *Id.* at 1175.

196. *In re* Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig., 241 F.R.D. 185, 191 (S.D.N.Y. Feb. 20, 2007) (applying the law of the transferor court to the question of certification under Rule 23(b)(3)).

197. *Id.* at 193 (internal quotation marks omitted).

Finally, is there a legitimate concern that judicial decisions will be influenced by ideology in ways that will be unfair to either side with respect to this issue? There is no clear answer to the question in this case. The circuit split in itself points to ideological differences. Where, as here, the direction of the law is contested and subject to widely differing interpretations, the unarticulated assumptions of judges about the usefulness of regulation, pharmaceutical innovation, and the legitimacy of the jury system will more likely influence the decision-making process. Therefore, it seems possible that ideology would influence the outcome if the cases were to be transferred to a single court in a circuit that had yet to rule on the preemption issue. This would be unfair to some litigants.

This analysis militates in favor of permitting the litigation to proceed in multiple forums. But cases need not remain scattered all over the country where they were filed. Instead, the JPML could decide to allocate cases to regional centers. Cases that are brought in circuits adopting preemption may be transferred to a single region and dismissed or they will not be brought at all. Cases brought in circuits rejecting preemption will be permitted to proceed, having been transferred to a single court within one of those circuits. Finally, cases brought in circuits that have yet to decide the matter may be consolidated in a third region. This pluralist solution would not resolve the problem of forum shopping, but it would provide a *modus vivendi* to accommodate concerns about political authority and reflect the very real social differences expressed in the appellate court opinions.

C. The NSA Litigation

Another conflict of values is illustrated by a particularly difficult recent set of cases, the litigation arising out of allegations that telecommunications companies illegally wiretapped individuals, often referred as the *National Security Agency [NSA] Litigation*.[198] This litigation illustrates the simultaneous need for and costs of centralization and uniformity. Some of these wiretapping cases were brought in state court and others in federal court. The state court actions consisted of claims under state privacy law rather than any federal law. In order to consolidate all cases relating to the underlying facts—the wiretapping of individuals by a number of telecommunica-

198. 444 F. Supp. 2d 1332 (J.P.M.L. 2006) (transferring cases to the United States District Court for the Northern District of California as MDL 1791).

tion companies—in MDL 1791, the state cases would have to be removed to federal court. The state plaintiffs claimed that their cases were not properly removed to federal court because, under the well-pleaded complaint rule, their claims were purely state law claims.[199] The federal court found that the state secrets privilege "requires dismissal if national security concerns prevent plaintiffs from proving the *prima facie* elements of their claim."[200] For that reason, the court held that federal jurisdiction was appropriate. The court ruled that the scope of the privilege is a substantive federal issue and there is "'a serious federal interest in claiming the advantages thought to be inherent in a federal forum.'"[201] All related cases were transferred to the Northern District of California.

The three-factor test helps us determine whether pluralism or centralization is the better approach for responding to this litigation. First, to what extent is there disagreement as to the substance of the law in this case? Like the preemption scenario, the issues underlying the *NSA Litigation* are contentious and overtly politicized. The disagreement here has not resulted in a circuit split providing direct proof of the disagreement. The public debate on the issue makes clear, however, that the underlying question of when the state secret privilege should apply, as well as the extent to which private companies should be held liable for complying with these governmental orders, is hotly contested.

Second, is the question to be decided such that inconsistent adjudication will result in substantial harm to the litigants or the legal system? In this case, inconsistent decisions may result in substantial harm to the government and the public interest because of the national security risks in revealing the information claimed to be privileged. Furthermore, there is a risk that if litigation is brought in multiple forums, one outlier judge will permit access to materials that other judges deemed privileged. That proverbial bell could not be unrung. On the other hand, the safety valve of an appeal, combined with the fact that it is unlikely that an outlier decision would be upheld, weighs against finding substantial harm, at least with respect to the federal

199. *In re* Nat'l Sec. Agency Telecomms. Records Litig., 483 F. Supp. 2d 934, 937 (N.D. Cal. 2007).

200. *Id.* at 942.

201. *Id.* at 943 (quoting Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 313 (2005)). Although the federal government had not yet intervened at the time of the decision, it had declared its intention to intervene and assert the state secret privilege.

courts. It would be reasonable for a court to find that inconsistency could cause substantial harm in a case such as this one.

Finally, is there a legitimate concern that judicial decisions will be influenced by ideology in ways that will be unfair to either side with respect to the substantive issues at stake? This is a substantial concern in a case such as this, because of the political nature of the question at hand. This fact is evidenced by the decision to remove the cases to federal court despite the fact that removal seems to violate the well-pleaded complaint rule. State court judges could be more skeptical of the federal government's motives and more concerned about the potential for using the state secret privilege to chill legitimate litigation.

The facts of this case tilt in favor of centralization largely on the basis of the second factor. Disagreement must come in the political area, rather than the judicial one, because of the difficulty caused by inconsistent judgments on the privilege issue. This conclusion favoring centralization raises serious political concerns. The outcome of a single court's ruling on the state secret privilege will be dispositive of these cases. Applying the privilege will prevent the plaintiffs from obtaining any discovery, leaving them with no proof, and thus will require dismissal of their claims. The court's ruling on this pretrial motion could deny the only available opportunity for the public to learn what its government is doing and for the plaintiffs' case to be decided on the merits. On the other hand, the possibility of an appeal mitigates this concern somewhat.

VI. CONCLUSION

Litigation has many purposes: to resolve disputes, make litigants whole, create norms, and force information. Information is power. The ability to force information or to curtail its dissemination is a critical component of a group or government's ability to maintain the existing power structure or destabilize it.[202] For this reason, it is risky for a society to place such power in the hands of a single court. In a case such as the *NSA Litigation*, silence may be advisable given the national security issues at stake. To centralize this decision, however,

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202. *See* Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354, 355-58 (1999) (arguing that the increase in privatization of information reinforces the existing power structure and hinders society's information production and exchange process); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 786-87 (1987) (arguing that regulation of information, whether by the government or new agencies, limits political debate).

requires a lot of faith in the transferee court to make the right decision. Centralization of decisions such as these may result in fundamental unfairness and the perpetuation of constitutional violations by the government and private entities.

The risk of centralization is silence. By contrast, pluralism and the institutional conflict that it permits may spur either a useful conversation or a cacophony. Having a real debate over social issues on which there is no consensus requires a variety of voices of authority. This means that overlapping institutions remain in conflict while a consensus is developed. Inevitably, it will be the socially contentious issues that are worth litigating.

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